SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN RAILROAD CO., ET AL., APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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[fol. 1] Secretary's Certificate to following transcript (omitted in printing).

[fol. 3]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Application of

RAILWAY EXPRESS AGENCY, INCORPORATED
(A Delaware Corporation)

Under Sections 20a and 214 of the Interstate Commerce Act for authority to issue securities

---

FINANCE DOCKET No. 23324

APPLICATION AND ATTACHED EXHIBITS—
Filed October 7, 1964

[fol. 4] CAPTION

In the matter of application of:

A. Railway Express Agency, Incorporated, 219 East 42nd Street, New York, N. Y. 10017.

B. Applicant is a corporation organized for the purpose of engaging in the transportation of property by express on railroads throughout the United States of America, and in Puerto Rico and Canada. Applicant is also a common carrier by motor vehicle (I.C.C. Docket No. MC66562).

C. Applicant proposes to issue 500,000 shares of its authorized but unissued shares of Common Stock, par value $1 per share.

[File endorsement omitted]

D. Applicant operates in all 50 United States, the District of Columbia, Puerto Rico and Canada.

E. There are no related Finance proceedings pending or to be filed by Applicant.

F. Correspondence with respect to this application should be addressed to:

[fol. 5]

William J. Taylor, Esq.,
General Counsel,
Railway Express Agency, Incorporated,
219 East 42nd Street,
New York, N. Y. 10017

with a copy to:

Henry P. Riordan, Esq.,
Cravath, Swaine & Moore,
1 Chase Manhattan Plaza,
New York, N. Y. 10005

To the INTERSTATE COMMERCE COMMISSION,
Washington, D. C.

The following statements and information, identified by numbers and letters corresponding to those used in Form BF-6, the use of which is required by Section 56.1 of Title 49 of the Code of Federal Regulations, are submitted by Applicant in support of the authority sought:

Item 1. General information respecting applicant

(a) Applicant is a corporation which was organized under the laws of the State of Delaware on December 7, 1928.

(b) A copy of Applicant's Amended Certificate of Incorporation as filed in the State of Delaware on January 29, 1963, and a copy of Applicant's By-Laws with amendments to date were filed with the Commission in Finance Docket No. 22596, *Railway Express Agency, Incorporated, Notes*

and are hereby incorporated in this application by reference.

Item 2. Financial statements

(a) Attached hereto as Exhibit 1 is a verified copy of Applicant's general balance sheet as of the latest practicable date.

[fol. 6] (b) Not Applicable.

(c) Attached hereto as Exhibit 2 is a verified copy of Applicant's income and profit and loss statement for the current calendar year to the latest available date. A copy of such statement for the last calendar year is on file with the Commission in Applicant's annual report.

Item 3. General description of the securities with respect to which this application is made.

(a) This application covers the issue of stock described as follows:

(1) The kind and class: Common Stock, of which there is only one class authorized, of the Applicant.

(2) The number of shares authorized, outstanding and to be issued: 2,576,000 shares authorized, 1,999,188 shares outstanding and 500,000 shares to be issued.

(3) Par value of each share: $1 per share.

(4) Amount: 500,000 shares.

(5) Voting rights: Each share of Common Stock shall have equal voting rights with every other share of Common Stock.

(6) Preferences: None.

(7) Conversion privileges: None.

(8) Call provisions: None.

(9) Liquidation rights: Each share of Common Stock will have equal rights on liquidation with every other share of Common Stock.

[fol. 7] (10) Whether it is assessable: The Common Stock is non-assessable.

(b) Not Applicable.

(c) A specimen of the Common Stock proposed to be issued was filed with the Commission as Exhibit 5 (page 2) in Finance Docket No. 22349, *Railway Express Agency, Incorporated, Stock,* and is hereby incorporated in this application by reference.

(d) Not Applicable.

Item 4. Purposes of the proposed issue or assumption and uses of the proceeds.

The amount of the net proceeds of $10,000,000 to be received by Applicant upon issuance of the Common Stock to be used for each of the following purposes is as follows:

(a) Not Applicable.

(b) Not Applicable.

(c) Not Applicable.

(d) Not Applicable.

(e) Not Applicable.

(f) *Other Purposes:* $10,000,000. The primary purpose to which the proceeds of the issuance of Common Stock will be devoted is the improvement of the balance between Applicant's funded debt and its capital stock by crediting $500,000 to capital stock issued account (No. 791) and $9,500,000 to premium on capital stock account (No. 794). The working capital of Applicant will also be correspond-
[fol. 8] ingly improved by the sale of the shares. Ref-

erence is made to Item 5(a) below for a more complete explanation of the reasons for such application of the proceeds.

Item 5. The facts and circumstances on which the Applicant relies.

(a) The facts and circumstances on which the Applicant relies to establish that the proposed issue

(1) is for some lawful object within its corporate purpose and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the Applicant of service to the public as a common carrier, and which will not impair its ability to perform that service, and

(2) is reasonably necessary and appropriate for such purpose,

are as follows:

Applicant proposes to issue 500,000 shares of its Common Stock to The Greyhound Corporation (hereinafter referred to as "Greyhound"). The proposed issue of stock is for a lawful object within the corporate powers of Applicant as shown by the Amended Certificate of Incorporation of Applicant referred to in Item 1(b) above. The issuance of 500,000 shares of Common Stock will have the effect of bringing about a more normal balance between Applicant's funded debt and its capital stock and this improved relationship will be of benefit to Applicant in financing its [fol. 9] future requirements. Such issuance will also have the effect of broadening the ownership of Applicant's capital stock.

As pointed out in the application filed in Finance Docket No. 22349, Applicant was operated on a non-profit basis from March of 1929 to July of 1961. When the Applicant was put on a profit-and-loss basis on July 1, 1961, it found

that its ratio of debt to capital stock placed it at a disadvantage in attempting to borrow funds. It was to improve this situation and to eliminate the requirement that only railroad companies could be stockholders of Applicant that the Applicant applied for and obtained Commission approval in Finance Docket No. 22349 to reclassify and split Applicant's stock and to remove certain restrictions on its ownership and transfer. The issuance of 500,000 authorized but unissued shares of Common Stock for a total price of $10,000,000, approval of which is requested in this application, would (1) further strengthen Applicant's ratio of capital stock to funded debt and better Applicant's borrowing position and (2) further the purpose expressed in the application and order in Finance Docket No. 22349 by permitting a non-railroad company to become a stockholder of Applicant.

The need for additional borrowings by Applicant is evidenced by the statement of Anticipated Terminal Capital Expenditures for Fiscal Year July 1964-June 1965 and the statement of Automotive Program for Fiscal Year [fol. 10] July 1964-June 1965, both attached hereto as Exhibit 3. As set forth in such statement, Applicant proposes to authorize in such fiscal year expenditures of $27,323,355 for terminal capital projects and $10,481,201 for acquisition of automotive equipment. Both areas of expenditure are obviously crucial to Applicant's operations as an express company, yet it appears that retained earnings will not provide sufficient capital to permit Applicant to make such expenditures and comparable expenditures in future years without borrowings. Although it is possible that a portion of such expenditures may be made out of working capital to the extent management believes that the increase in working capital which will result from the sale of the shares is not required to be retained for that purpose, no specific allocation thereto has been made. To the extent such allocation is made, however, the sale of the shares will reduce to some extent the amount of future borrowings required.

Applicant further believes that the issuance of 500,000 shares of Applicant's Common Stock to Greyhound will give Greyhound a sufficient equity interest in the Applicant to provide a working basis which will justify the Applicant and Greyhound in going forward with the study of, and ultimately entering into an agreement with respect to, the consolidation of certain operating functions and facilities with a view to effecting economies, improving service and increasing public receptivity and patronage. Although it is not possible at this time to predict the exact nature of [fol. 11] the economies and improved service which will result from such a study, Applicant believes that any results achieved thereby will be beneficial to both the Applicant and the public.

The price at which Applicant proposes to issue the shares of Common Stock is $20 per share. Applicant believes such price is very favorable to Applicant.

The proposed issuance of the 500,000 shares of Common Stock has been approved by stockholders holding over 80% of the issued and outstanding capital stock of the Applicant.

(b) Not Applicable.

(c) Not Applicable.

(d) This application is to sell securities without competitive bidding. The issuance of the Common Stock of the Applicant is specifically exempt from competitive bidding requirements under the ruling of the Commission in *Ex Parte 158, In re Competitive Bidding in Sale of Securities,* 257 I.C.C. 129, by reason of the fact that the securities to be issued by Applicant consist solely of common stock.

Item 6. Terms of sale or other disposition, and estimate of expenses.

(a) Applicant proposes to sell the Common Stock at a price of $20 per share upon the terms and conditions set forth in the Agreement referred to in Item 7 hereof and attached hereto as Exhibit 4.

(b) The expenses to be incurred by Applicant in con-
[fol. 12] nection with such sale of the Common Stock are estimated as follows:

(1) There will be no commissions paid or discounts allowed on such sale.

(2) The only expenses to be incurred in connection with the sale would be legal expenses estimated at $5,000 and $10,000 for documentary stamp taxes on the issuance of the shares.

(3) The grand total of commissions, discounts, and expenses is estimated to be $15,000.

Item 7. Contracts, underwritings and other arrangements.

The Applicant proposes to issue the 500,000 shares of its Common Stock to Greyhound pursuant to the terms of an Agreement between Applicant and Greyhound, a copy of which is attached hereto as Exhibit 4.

Item 8. Resolutions and other authorizations.

(a) Attached hereto as Exhibit 5 are certified copies of resolutions of the Board of Directors of Applicant authorizing the transaction and designating by name and for that purpose the executive officer by whom this application is signed, verified and filed on behalf of the Applicant.

(b) Attached hereto as Exhibit 6 are certified copies of resolutions of the stockholders of the Applicant authorizing such issue, accompanied by transcripts of the minutes of their meetings showing the number of shares voted for and
[fol. 13] against the resolutions, and the number of share-votes required to adopt the resolutions.

(c) See Item 8(a) above.

(d) Not Applicable.

(e) Not Applicable.

Item 9. Opinion of Counsel.

Attached hereto as Exhibit 7 is an opinion of counsel for Applicant meeting the requirements of Item 9.

WHEREFORE, Applicant prays that the Commission enter an order under Sections 20a and 214 of the Interstate Commerce Act authorizing the proposed issue as described in this application.

Dated this 6th day of October, 1964.

RAILWAY EXPRESS AGENCY, INCORPORATED,
by /s/ WILLIAM B. JOHNSON
President

[fol. 14] *Duly sworn to by William B. Johnson, jurat omitted in printing.*

[fol. 15] Certificate of Service (omitted in printing).

RAILWAY EXPRESS AGENCY, INCORPORATED
GENERAL BALANCE SHEET AS OF JUNE 30,1964

A S S E T S

CURRENT ASSETS:		
Cash with Treasurer (See Note 1)		$ 22 361 594
Special Deposits		7 100
Loans and Notes Receivable		26 866 921
Traffic Balances Receivable		293 254
Net Balances Receivable from Agencies		16 990 732
Miscellaneous Accounts Receivable		4 087 117
Material and Supplies		625 467
Interest, Dividends and Rents Receivable		152 560
Working Fund Advances		5 125
Other Current Assets		1 248 678
Total Current Assets		$ 72 538 548
INVESTMENT:		
Real Property and Equipment	$131 817 575	
Less - Accrued Depreciation	75 890 364	
	$ 55 927 211	
Investments in Affiliated Companies:		
Stocks	$ 548 500	
Notes	550 000	
Total Investments in Affiliated Companies	$ 1 098 500	
Other Investments - Stocks and Bonds	1 040	
Total Net Investment		$ 57 026 751
DEFERRED ASSETS:		
Insurance and Other Reserve Funds	$ 80 260	
Other Deferred Assets	87 205	
Total Deferred Assets		157 465
UNADJUSTED DEBITS:		
Rents and Insurance Premiums Paid in Advance	$ 85 178	
Taxes Paid in Advance	799 666	
Other Unadjusted Debits	370 208	
Total Unadjusted Debits		1 255 052
TOTAL ASSETS		$131 087 816

L I A B I L I T I E S

CURRENT LIABILITIES:		
Traffic Balances Payable		$ 264 345
Audited Accounts and Wages Unpaid		14 172 192
Miscellaneous Accounts Payable		4 114 897
Matured Interest Unpaid		68 300
Miscellaneous Advances Payable		3 580
Unpaid Money Orders, Checks and Drafts		1 063 432
To Carriers for Hauling Express		11 787 312
Estimated Tax Liability		4 783 521
Unmatured Interest, Dividends and Rents Payable		436 897
Other Current Liabilities		13 282 357
Total Current Liabilities (See Note 1)		$ 49 976 833
ADVANCES FROM STOCKHOLDERS		$ 27 637 054
NOTES PAYABLE (See Note 2)		$ 8 468 000
EQUIPMENT OBLIGATIONS		
Automotive Equipment	$17 877 293	
Refrigerator Cars	6 404 450	
Total Equipment Obligations (See Note 3)		$ 24 281 743
DEFERRED LIABILITIES		$ 129 643
UNADJUSTED CREDITS:		
Tax Depreciation Equalization Reserve	$ 6 643 857	
Operating and Insurance Reserve (See Note 4)	3 352 021	
Other Unadjusted Credits	59 601	
Total Unadjusted Credits		$ 10 055 479
STOCK:		
Capital Common Stock - Issued and Outstanding		$ 1 999 188
CORPORATE SURPLUS:		
Profit and Loss Balance		8 539 876
TOTAL LIABILITIES		$131 087 816

NOTE 1: At June 30, 1964, there were outstanding $9,030,597 of checks, vouchers and drafts issued prior to July 1, 1964. This total is included in Current Liabilities and Cash with Treasurer.

NOTE 2: Notes Payable of $8,468,000 include installments of $425,000 due to be paid during Fiscal Year ending June 30, 1965.

NOTE 3: Equipment Obligations of $24,281,743 include installments of $5,744,064 due to be paid during Fiscal Year ending June 30, 1965.

NOTE 4: Operating and Insurance Reserves include $3,268,798 which it is expected will be paid during Fiscal Year ending June 30, 1965.

CERTIFIED CORRECT:

New York, October 2, 1964

Vice President and Controller

Controller's Department

EXHIBIT 1 TO APPLICATION

[fol. 16]

RAILWAY EXPRESS AGENCY, INCORPORATED

Results of Operations - 6 Months ended June 30, 1964

Revenues and Income	
Charges for Transportation	$196 673 373
Other Revenues and Income	5 043 959
Total Revenues and Income	$201 717 332
Deductions from Revenues and Income	
Operating Expenses	$130 830 216
Express Taxes	11 216 052
Interest on Funded Debt	1 585 524
Other Deductions	274 458
Payments to Rail and Other Carriers for Hauling Express	56 713 074
Total Deductions	$200 619 324
Net Profit from Operations	$ 1 098 008
Provision for Income Taxes	$ 158 398
Net Profit	$ 939 610

Certified Correct

Vice President and Controller

New York, October 2, 1964

Controller's Department

EXHIBIT 2 TO APPLICATION

[fol. 17]

ANTICIPATED TERMINAL CAPITAL EXPENDITURES FOR FISCAL YEAR JULY-1964-JUNE-1965

Locations			Total Cost	Amt. to be expended July, 1964-June, 1965	
Terminal Projects Completion Date This Fiscal Year					
Dayton,	Ohio	$768 971		$ 768 971	
Memphis,	Tenn.	650 000		650 000	
Jacksonville,	Fla.	150 000		150 000	
Brunswick,	Ga.	60 000		60 000	
Poughkeepsie,	N.Y.	205 575		205 575	
Atlantic City,	N.J.	150 000		150 000	
Wilmington,	Del.	300 000		300 000	
Providence,	R.I.	500 000		500 000	
Omaha,	Nebr.	472 925		472 925	
St. Louis,	Mo.	550 000		550 000	
Colorado Springs,	Colo.	35 000		35 000	
Albany,	N.Y.	50 000		50 000	
			$3 892 471		$3 892 471
Air Express Terminal Projects Completion Date This Fiscal Year					
Chicago,	Ill.	$999 665		$ 999 665	
Detroit,	Mich.	245 400		245 400	
Minneapolis,	Minn.	110 000		110 000	
Los Angeles,	Calif.	220 000		220 000	
San Francisco,	Calif.	110 000		110 000	
			1 685 065		1 685 065
Terminal Projects Completion Date Beyond This Fiscal Year					
Boston,	Mass.	$4 350 000		$2 500 000	
Detroit,	Mich.	3 500 000		500 000	
Indianapolis,	Ind.	1 470 819		1 000 000	
Minneapolis,	Minn.	1 700 000		699 819	
Cleveland,	Ohio	2 500 000		1 000 000	
Atlanta,	Ga.	3 900 000		1 000 000	
Washington,	D.C.	3 500 000		1 000 000	
			20 920 819		7 699 819
Material Handling Systems Completion Date This Fiscal Year					
Jacksonville,	Fla.	$500 000		$500 000	
PPM Terminal,	N.J.	75 000		75 000	
			575 000		575 000
Additional expenditure to cover modification of present systems, replacements of outmoded conveyors and requests for conveyor equipment required for terminal improvement program projects			50 000		50 000
Alterations of Facilties for Projex Rooms 10 @ $20,000 each			200 000		200 000
	TOTAL		$27 323 355		$14 102 355

[fol. 18]

AUTOMOTIVE PROGRAM
FOR FISCAL YEAR JULY 1964-JUNE 1965

Replacements		Cost	
300	Trucks	$1 260 000	
700	Trucks	4 060 000	
50	Gas Tractors	397 500	
25	Diesel Tractors	340 000	
40	Trailers	222 680	
131	Passenger Cars	252 175	
80	Depot Units	360 000	
1 326		$6 892 355	
	Predicted Cost Increase 2%	137 847	
	Freight & Miscellaneous Charges 4-3/4%	333 935	$ 7 364 137
Additions			
47	Trucks	$ 292 300	
98	Tractors	1 319 800	
154	Trailers	889 218	
1	Passenger Car	1 925	
88	Misc. Terminal Eqpt.	276 770	
388		$2 780 013	
	Freight & Miscellaneous Charges 4-3/4%	132 051	2 912 064
Containerization			
3	Dempster Sideloaders	$ 52 300	
20	Trailer Chassis	43 260	
60	Unit Haul Containers	109 440	205 000
	TOTAL		$10 481 201

[fol. 20]

EXHIBIT 4 TO APPLICATION

October 1, 1964

The Greyhound Corporation
140 South Dearborn Street
Chicago 3, Illinois

Dear Sirs:

On September 1, 1964, the Board of Directors of this Corporation (hereinafter called R E A) authorized its President in the name of R E A to make a firm offer to sell to you 500,000 shares of R E A's authorized but unissued Common Stock at the price of $20 per share upon the following terms and conditions:

(a) The R E A By-Laws will be amended so that The Greyhound Corporation shall be permitted to name 20% of the R E A Board of Directors.

(b) The R E A Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,637,054 of outstanding 5% notes, issued originally to R E A's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.

(c) The R E A Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between R E A and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage.

(d) The R E A Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some R E A stock to airlines and/or

the general public if and when conditions appear favorable to the best interests of R E A as a company.

[fol. 21] (e) The Greyhound Corporation shall offer to purchase up to 1,000,000 shares of the common stock of R E A from present shareholders at a price of $20 per share cash. Such offer to purchase will remain open and in full force and effect for a period of sixty days following the closing date of the transaction involving the 500,000 authorized unissued shares of R E A.

(f) The offer of R E A shall expire at 12:00 Noon on December 31, 1964.

(g) The offer of R E A may be accepted immediately, subject to all necessary authorizations from the Interstate Commerce Commission and to approval by the shareholders of this corporation of (i) the issuance to The Greyhound Corporation pursuant to said offer of 500,000 shares of authorized but unissued common stock of this corporation and (ii) the amendments to the By-Laws of this corporation required by subparagraph (a) of said offer.

At the meeting of the Board on September 1, the Board also adopted resolutions complying with the conditions set forth in subparagraphs (b), (c) and (d) above and called a special meeting of stockholders in order to obtain the approval of R E A stockholders of the issuance of the shares pursuant to said offer and of the amendments to the R E A By-Laws referred to in subparagraph (a) above. On October 1, 1964, the stockholders approved the issuance of the shares pursuant to the offer and approved said amendments, thereby complying with the condition set forth in subparagraph (a) above. Certified copies of the said resolutions as adopted by the Board and by the stockholders at that meeting are enclosed herewith.

In accordance with the foregoing authorization, R E A hereby makes a firm offer to sell to you, subject to the ob-

taining of the authorizations from the Interstate Commerce Commission contemplated by subparagraph (g) of the preceding paragraph, 500,000 shares of authorized but unissued common stock of R E A at the price of $20 per share on the terms and conditions set forth in the preceding paragraph.

If you desire to accept such offer, please sign the acceptance at the foot of the enclosed copy of this letter and [fol. 22] return the same to the undersigned, whereupon this letter and such acceptance shall constitute a binding agreement between R E A and you.

This letter will also serve to confirm our understanding that (1) R E A will, subject to your acceptance of this offer, promptly file an application with the Interstate Commerce Commission pursuant to Sections 20a and 214 of the Interstate Commerce Act for authorization to issue and sell to you the 500,000 shares of R E A common stock pursuant to this offer, (2) settlement for said 500,000 shares will be made within 30 days after authorization is received from the Interstate Commerce Commission for the issuance and sale of said shares, and (3) compliance by you with the conditions set forth in subparagraph (e) of said first paragraph shall be deemed to have been made if the tender offer referred to therein is made at the time of settlement for said 500,000 shares and the period during which stock may be tendered remains open for sixty days thereafter.

As you know, the shares tendered pursuant to any tender offer will be subject to rights of first refusal which have been granted to other shareholders. You will, of course, have no obligation to purchase shares in respect of which such right of first refusal is exercised.

Very truly yours,

RAILWAY EXPRESS AGENCY, INCORPORATED

By /s/ WILLIAM B. JOHNSON
President

The foregoing offer of Railway Express Agency, Incorporated is hereby accepted, subject to all necessary authorizations from the Interstate Commerce Commision.

THE GREYHOUND CORPORATION

By /s/ F. W. ACKERMAN
President and Chairman of the Board

Dated: October 6, 1964

[fol. 23]

EXHIBIT 4, APPENDIX A

Certified copy of the resolutions adopted by the Board of Directors of Railway Express Agency, Incorporated on September 1, 1964 (refer to Exhibit 5, side folios 25 through 30).

[fol. 24]

EXHIBIT 4, APPENDIX B

Certified copy of the resolutions adopted at a Special Meeting of the Stockholders of Railway Express Agency, Incorporated on October 1, 1964 (refer to Exhibit 6, side folios 35 through 37).

[fol. 25]

EXHIBIT 5 TO APPLICATION

I hereby certify that at a meeting of the Board of Directors of Railway Express Agency, Incorporated, duly called and held in the City of New York on September 1, 1964, a quorum being present, the following resolutions were adopted:

RESOLVED, that the President or any Vice President of this corporation be, and he hereby is, authorized in the name and on behalf of this corporation to execute

and deliver to The Greyhound Corporation a firm offer to sell to The Greyhound Corporation 500,000 shares of authorized but unissued common stock of this corporation at the price of $20 per share, upon the following terms and conditions:

(a) The R E A By-Laws will be amended so that The Greyhound Corporation shall be permitted to name 20% of the R E A Board of Directors.

(b) The R E A Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,637,054 of outstanding 5% notes, issued originally to R E A's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.

(c) The R E A Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between R E A and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage.

(d) The REA Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some R E A stock to airlines and/or the general public if and when conditions appear favorable to the best interests of R E A as a company.

(e) The Greyhound Corporation shall offer to purchase up to 1,000,000 shares of the common stock of R E A from present shareholders at a price of $20 per share cash. Such offer to purchase will remain open and in full force and effect for a period of sixty days following the closing date of the transaction involving the 500,000 authorized unissued shares of R E A.

[fol. 26] (f) The offer of R E A shall expire at 12:00 Noon on December 31, 1964.

(g) The offer of R E A may be accepted immediately subject to all necessary authorizations from the Interstate Commerce Commission and to approval by the shareholders of this corporation of (i) the issuance to The Greyhound Corporation pursuant to said offer of 500,000 shares of authorized but unissued common stock of this corporation and (ii) the amendments to the By-Laws of this corporation required by subparagraph (a) of said offer.

RESOLVED, that this Board of Directors recommends to the stockholders of this corporation that they approve the issuance to The Greyhound Corporation pursuant to the offer set forth in the next preceding resolution of 500,000 shares of authorized but unissued common stock of this corporation.

RESOLVED, that this Board of Directors recommends to the stockholders of this corporation that, effective upon acceptance of the foregoing offer by The Greyhound Corporation, the By-Laws of this corporation be amended as follows:

A. Section 2 of Article II of the By-Laws of this corporation shall be amended so as to read in its entirety as follows:

"An annual meeting of stockholders shall be held on the first Wednesday of April in each year at eleven o'clock A.M. at which meeting there shall be elected by ballot a Board of Directors, not to exceed twenty-five in number. There may be seven Directors-At-Large, and the others shall be the persons nominated by districts as provided in Section 8 of this Article; provided, however, that if at any time any corporation or corporations engaged in whole or in part in the common carriage

of passengers by bus (hereinafter called Bus Company Stockholders) are the holders of at least 20% of the stock issued and outstanding, the Bus Company Stockholders shall be entitled to nominate five of the Directors-At-Large in the manner provided in the next succeeding paragraph. The number, not to exceed eighteen, so nominated by districts shall be determined as provided in said Section 8. At such meeting there shall be transacted such other business as may properly be brought before the meeting.

[fol. 27] "Not more than thirty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the Corporation shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, send to each Bus Company Stockholder a form of vote for the number of and for nominations for five Directors-At-Large. Each Bus Company Stockholder receiving the same shall thereupon name the persons proposed by such Bus Company Stockholder as nominees for five Directors-At-Large and return such vote to the Secretary with a statement of the number of shares voted by such Bus Company Stockholder in favor of each such nominee. Each Bus Company Stockholder shall be entitled to the same number of nominating votes for each of its said nominees for directors as the number of shares of stock which such Bus Company Stockholder will be entitled to vote at such annual meeting. The Secretary shall canvass the nominating votes of the Bus Company Stockholders received by him prior to such annual meeting and shall report the same to the stockholders at the meeting. The five nominees receiving the most nominating votes shall be the nominees for the five Directors-At-Large to be nominated by the Bus Company Stockholders."

B. Article XI of the By-Laws of this Corporation shall be amended by deleting the period at the end thereof and adding an additional proviso at the end of said Article XI reading as follows:

"; and provided further that if any such alteration or amendment be made in the number of Directors of this corporation or in the method of nominating Directors-At-Large of this corporation, said affirmative vote of two-thirds of the stock issued and outstanding and entitled to a vote shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, include a majority of the issued and outstanding stock held by the Bus Company Stockholders."

RESOLVED, that a special meeting of the stockholders of this corporation (hereinafter in these resolutions sometimes called the Meeting) be, and it hereby is, called to be held at the office of this corporation, 219 East 42nd Street, New York, New York, at 10 A.M., Eastern Daylight Time, on October 1, 1964, to consider and vote upon the following:

(1) the proposed amendments to the By-Laws of this corporation recommended by the Board of Directors in the next preceding resolution (hereinafter called the By-Law Amendments);

[fol. 28] (2) the approval of the issuance by this corporation of the 500,000 shares of capital stock of this corporation to be issued to The Greyhound Corporation as contemplated by the offer of R E A to The Greyhound Corporation approved at this meeting (hereinafter called the Stock Approval); and

(3) to transact such other business as may properly come before the meeting or any adjournment thereof;

RESOLVED, that Messrs. Frank E. Barnett, Fred Carpi, Prime F. Osborn and William B. Johnson, or

any of them, with full power of substitution, be, and they hereby are, appointed as a Proxy Committee to act on behalf of and represent such stockholders of this corporation as may appoint them their proxy to act for them at the Meeting and at any adjournment thereof;

RESOLVED, that the Secretary of this corporation be, and he hereby is, authorized and directed to give written notice of the Meeting, not less than 10 days before the day fixed for the Meeting, to each stockholder of this corporation entitled to vote at the Meeting, by mailing or causing to be mailed a copy of such notice in a postage prepaid envelope addressed to such stockholder at his post-office address as such address shall appear on the books of this corporation;

RESOLVED, that the Secretary of this corporation be, and he hereby is, authorized and directed to enclose or cause to be enclosed with each such notice to be mailed as provided in the next preceding resolution, copies of a Proxy Statement and Proxy in such form as shall be approved by the President or any Vice President of this corporation; and

RESOLVED, that Messrs. C. D. Vannoy and Alan F. Doniger be, and they hereby are, appointed Judges to conduct at the Meeting a vote of the holders of the capital stock of this corporation for and against the By-Law Amendments, the Stock Approval, and any other vote taken by ballot at the Meeting, and that such Judges in the exercise of the authority vested in them by the laws of the State of Delaware shall decide upon the qualifications of the voters and accept the votes of those qualified to vote for or against the By-Law Amendments and the Stock Approval, and when the vote thereon shall have been completed, count and ascertain the number of shares voted, respectively, for and against the By-Law Amendments and the Stock Approval, and declare whether the persons or bodies

[fol. 29] corporate holding two-thirds of the capital stock of this corporation entitled to vote thereon have voted for the By-Law Amendments and the Stock Approval, and make out a certificate stating (i) the number of shares of capital stock issued and outstanding and entitled to vote on the By-Law Amendments and the Stock Approval and (ii) the number of shares of capital stock voted for, and the number thereof voted against, the By-Law Amendments and the Stock Approval, respectively, and subscribe and deliver said certificate to the Secretary of this corporation.

RESOLVED, that upon acceptance of the offer by The Greyhound Corporation, Messrs. William B. Johnson, President, and C. D. Vannoy, Vice President and Treasurer of the company, be, and they hereby are, authorized to explore the possibility of refinancing the $27,637,054 principal amount of outstanding 5% notes, issued originally to this corporation's stockholders, or otherwise securing the waiver or cancellation of the prohibition against the payment of dividends which is contained in said notes; and upon the submission by such officers to this Board of a satisfactory program, this Board will take all such further action as may be necessary.

RESOLVED, that upon acceptance of the offer by The Greyhound Corporation, the President and any Vice Presidents whom he may designate are hereby authorized to undertake the negotiation of a long-term agreement with The Greyhound Corporation encompassing the consolidating of operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage; and upon the submission by the proper officers of this corporation to this Board of a satisfactory agreement, this Board will take all such further action as may be necessary to approve the same.

RESOLVED, that, upon acceptance of the R E A offer by The Greyhound Corporation, if and when the conditions appear favorable to the best interests of this corporation, the President is authorized and directed to submit to this Board of Directors a program pursuant to which airlines and/or the general public could acquire interests in the stock of this corporation; and, upon receipt of such a recommendation, this Board will consider seriously a program of such nature.

RESOLVED, that William B. Johnson, President, and C. D. Vannoy, Vice President and Treasurer, be and they hereby are, and each of them individually hereby is designated and authorized as the executive office to make, sign, verify and file an application to the Interstate Commerce Commission under Sections 20a and [fol. 30] 214 of the Interstate Commerce Act for authority to issue and deliver to The Greyhound Corporation 500,000 shares of this corporation's authorized and unissued common stock and for such other authority as may be necessary to effectuate the foregoing resolutions; and

RESOLVED, that the proper officers of this corporation be, and they hereby are, authorized to pay all such costs and expenses, and to take any and all other action and to execute, under the corporate seal of this corporation or otherwise, and deliver all such further instruments and documents as they in their discretion may deem necessary, proper or advisable in order to accomplish the purposes of the foregoing resolutions and each of them.

I further certify that the said resolutions have not been modified or revoked.

Dated: October 1, 1964.

/s/ LAWRENCE BERMAN
Secretary

(SEAL)

[fol. 31]

EXHIBIT 6 TO APPLICATION

MINUTES OF SPECIAL MEETING OF THE STOCKHOLDERS OF RAILWAY EXPRESS AGENCY, INCORPORATED, OCTOBER 1, 1964

Pursuant to notice dated September 1, 1964, a Special Meeting of the Stockholders of Railway Express Agency, Incorporated (the Corporation) was held at the Office of the Corporation, 219 East 42nd Street, New York, New York, on Thursday, October 1, 1964, at 10:00 A.M., New York time.

In accordance with the provisions of Article II, Section 7, of the Corporation's By-Laws, William B. Johnson, President, acted as Chairman. Lawrence Berman, Secretary, acted as Secretary of the meeting.

There were present three members of the Proxy Committee—Fred Carpi, Prime F. Osborn and William B. Johnson—and the Judges for the conduct of the meeting—C. D. Vannoy and Alan F. Doniger—all of whom were appointed by the Corporation's Board of Directors at its meeting on September 1, 1964.

There also were present representing stockholders—Wayne M. Hoffman, New York Central System, Edwin O. Schiewe, Chicago, Milwaukee, St. Paul and Pacific Railroad, Anthony Kane, Great Northern Railway, Earl F. Requa, Northern Pacific Railway, Alan C. Furth, Southern Pacific Company and T. M. Caiazza, The Atchison, Topeka and Santa Fe Railway Company.

The Chairman directed that the oath of the Secretary and of the two Judges be annexed to the minutes of the meeting as Exhibit I.

The Secretary then presented an affidavit showing that the Notice of Meeting, the Proxy Statement and the Form of Proxy were duly mailed on September 1, 1964, to each [fol. 32] stockholder of record and the Chairman directed that the affidavit be annexed to the minutes of the meeting as Exhibit II.

The Secretary presented a complete list, arranged in alphabetical order, of the holders of record of the Common Stock of the Corporation entitled to vote at the meeting. The list showed that 1,999,188 shares of Common Stock of the Corporation were issued and outstanding. The Chairman directed that the list of stockholders be delivered to the Judges and that it be kept available for inspection during the meeting.

Upon request of the Chairman, the Secretary reported that a total of 1,924,452 shares of the Corporation's stock was present or represented by proxy at the meeting, and the Chairman declared that a quorum was present and that the meeting would proceed.

The Chairman stated that the minutes of the last meeting of the stockholders were available for inspection both during and after the meeting and that unless there were objection they would not be read. There was no objection.

The Chairman stated that the first matter to be acted upon was the approval by the stockholders of the issuance by the Corporation of 500,000 authorized but unissued shares of Common Stock of the Corporation to The Greyhound Corporation (Greyhound) pursuant to an offer to be made to Greyhound authorized by the Board of Directors on September 1, 1964. The Chairman indicated that pursuant to a resolution adopted by the stockholders of the Corporation at a Special Meeting on September 17, 1962, [fol. 33] approval of such issuance by the holders of at least two-thirds of the Corporation's Common Stock issued and outstanding was required and that the Board of Directors recommended to the stockholders that they approve such issuance. Upon request of the Chairman, the Secretary read the resolution proposed to be adopted and upon a motion by Mr. Carpi and seconded by Mr. Osborn, the resolution was put to a vote. The First Report by the Judges, which sets forth in full the resolution, showed that the vote was 1,654,572 shares in favor of and 269,880 shares opposed to the resolution. The Chairman declared that the

resolution had been duly adopted by the holders of more than the required two-thirds of the Corporation's issued and outstanding Common Stock and directed that the report be attached to the minutes of the meeting as Exhibit III.

The second matter acted upon was a proposal to amend the By-Laws of the Corporation, described in Proposal No. 2 in the Proxy Statement, to increase the number of members of the Board of Directors from 23 to 25 and to increase the number of Directors-At-Large from 5 to 7. The proposed amendment would also provide that 5 Directors-At-Large be nominated by stockholders of the Corporation holding 20% of the issued and outstanding stock of the Corporation who are engaged in whole or in part in the common carriage of passengers by bus and would require the approval of a majority of the Corporation's stock held by such bus company stockholders for any future change in the number of directors or in the method of nominating Directors-At-Large. The Chairman informed the meeting that a resolution recommending the proposed amendment had been adopted by the Board of Directors and, upon his [fol. 34] request, the Secretary read the resolution proposed to be adopted by the stockholders. Upon motion by Mr. Osborn, seconded by Mr. Hoffman, the resolution to authorize the adoption of the proposed amendment was put to a vote. The Second Report by the Judges, which sets forth in full the resolution, showed that the vote was 1,654,572 shares in favor of and 269,880 shares opposed to the resolution. The Chairman declared that the resolution had been duly adopted by the holders of more than the required two-thirds of the Corporation's issued and outstanding Common Stock and directed that the report be attached to the minutes of the meeting as Exhibit IV.

All votes taken at the meeting, except as specifically stated herein, were taken by written ballot. There being no further business to come before the meeting, upon mo-

tion by Mr. Hoffman, seconded by Mr. Carpi, the meeting was adjourned by voice vote.

/s/ Lawrence Berman
Lawrence Berman
Secretary

[fol. 35] I hereby certify that at a special meeting of the stockholders of Railway Express Agency, Incorporated, duly called and held in the City of New York on October 1, 1964, a quorum being present, the following resolutions were adopted:

Resolved, that, subject to all necessary Interstate Commerce Commission authorizations, the stockholders of this Corporation approve the issuance by this Corporation to The Greyhound Corporation of 500,000 shares of authorized but unissued shares of Common Stock of this Corporation in accordance with the offer of this Corporation to The Greyhound Corporation authorized by the Board of Directors of this Corporation at its meeting on September 1, 1964.

Resolved, that, subject to the acceptance by The Greyhound Corporation of the offer of this Corporation to The Greyhound Corporation authorized by the Board of Directors of this Corporation at its meeting on September 1, 1964, the stockholders of this Corporation hereby amend the By-Laws of this Corporation (i) to increase the number of members of the Board of Directors from 23 to 25, (ii) to increase the number of Directors-At-Large from five to seven, (iii) to provide for the nomination of five Directors-At-Large by stockholders holding at least 20% of the issued and outstanding stock of this Corporation who are engaged in whole or in part in the common carriage of passengers by bus, and (iv) to provide for a vote by such bus company stockholders upon certain amendments to the By-Laws of this Corporation, said amendment of the By-Laws to be effected by

A. Deleting Section 2 of Article II of the By-Laws of this Corporation and substituting therefor the following:

"An annual meeting of stockholders shall be held on the first Wednesday of April in each year at eleven o'clock A.M., at which meeting there shall be elected by ballot a Board of Directors, not to exceed twenty-five in number. There may be seven Directors-At-Large, and the others shall be the persons nominated by districts as provided in Section 8 of this Article; provided, however, that if at any time any corporation or corporations engaged in whole or in part in the common carriage of passengers by bus (hereinafter called Bus Company Stockholders) are the holders of at least 20% of the stock issued and outstanding, the Bus Company Stockholders shall be entitled to nominate five of the Directors-At-Large in the [fol. 36] manner provided in the next succeeding paragraph. The number, not to exceed eighteen, so nominated by districts shall be determined as provided in said Section 8. At such meeting there shall be transacted such other business as may properly be brought before the meeting.

"Not more than thirty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the Corporation shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, send to each Bus Company Stockholder a form of vote for the number of and for nominations for five Directors-At-Large. Each Bus Company Stockholder receiving the same shall thereupon name the persons proposed by such Bus Company Stockholder as nominees for five Directors-At-Large and return such vote to the Secretary with a statement

of the number of shares voted by such Bus Company Stockholder in favor of each such nominee. Each Bus Company Stockholder shall be entitled to the same number of nominating votes for each of its said nominees for directors as the number of shares of stock which such Bus Company Stockholder will be entitled to vote at such annual meeting. The Secretary shall canvass the nominating votes of the Bus Company Stockholders received by him prior to such annual meeting and shall report the same to the stockholders at the meeting. The five nominees receiving the most nominating votes shall be the nominees for the five Directors-At-Large to be nominated by the Bus Company Stockholders."

B. Deleting the period at the end of Article XI of said By-Laws and adding an additional proviso at the end thereof reading as follows:

"; and provided, further that if any such alteration or amendment be made in the number of Directors of this Corporation or in the method of nominating Directors-At-Large of this Corporation, said affirmative vote of two-thirds of the stock issued and outstanding and entitled to a vote shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, include a majority of the issued and outstanding stock held by the Bus Company Stockholders."

[fol. 37] I further certify that the said resolutions have not been modified or revoked.

Dated: October 1, 1964.

/s/ LAWRENCE BERMAN
Secretary

(Seal)

[fol. 38]

EXHIBIT 7 TO APPLICATION

OPINION OF COUNSEL

In my opinion, the issue of stock with respect to which this application is made is for a lawful object within the Applicant's corporate purposes; is compatible with the public interest; is necessary or appropriate for, or consistent with, the proper performance by the Applicant of service to the public as a common carrier; will not impair Applicant's ability to perform that service; is reasonably necessary and appropriate for such purposes; and will be legally authorized and valid if approved by the Interstate Commerce Commission.

/s/ WILLIAM J. TAYLOR
General Counsel

[fol. 39]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SUPPLEMENT TO APPLICATION—Filed October 13, 1964

RAILWAY EXPRESS AGENCY, INCORPORATED
219 East 42nd Street
New York, N.Y. 10017

Secretary, Interstate Commerce Commission, 12th and Constitution, Washington 25, D. C.

October 12, 1964

Railway Express Agency, Incorporated, Stock
(Finance Docket No. 23324)

Dear Sir:

We refer to the application filed in Finance Docket No. 23324 on October 7, 1964 by Railway Express Agency, Incorporated (hereinafter called REA) under Sections 20a and 214 of the Interstate Commerce Act for authority to issue 500,000 shares of REA's Common Stock, par value $1 per share, to The Greyhound Corporation (hereinafter called Greyhound) pursuant to the terms and conditions set forth in the application. At the request of Mr. Frank E. Grutzik, Assistant Chief of the Section of Proceedings, Bureau of Finance of the Interstate Commerce Commission, this letter will discuss two questions raised with respect to the application.

1. *Application of Proceeds of Issue*

The proceeds of $10,000,000 from the issuance of 500,000 shares of REA's Common Stock to Greyhound will be ap-

[File endorsement omitted]

plied by REA for the purpose of (a) reimbursing REA in part for cash expenditures made from retained earnings of REA for additions and betterments or other capital expenditures, and (b) to provide funds for required additional capital expenditures to be made by REA in the future. REA had no retained earnings until July of 1961, when the Standard Express Operations Agreement between REA and the railroad carriers parties thereto was amended to put REA on a profit and loss basis. In 1960 REA began a capital improvement program; prior to that time, REA had either leased the major portion of its facilities or used facilities owned by other carriers.

[fol. 40] From 1960 through August 20, 1964, REA expended a total of $16,936,938 for capital expenditures in connection with the acquisition and modernization of terminals. There is enclosed herewith a schedule showing the purposes of the disbursements, the amount thereof and all credits in respect thereof to capital account within the period and the primary accounts of the Commission's classifications to which disbursements and retirements were charged or credited during the period. During the same period REA borrowed for such purposes a total of $8,500,000 (of which $8,468,000 is presently unpaid) and thus was required to finance from internally generated funds (e.g., earnings, depreciation, etc.) the balance of such capital expenditures, namely, $8,436,938 plus the payments on that portion of the loans repaid. In view of REA's short history of profitable operations it has not, of course, been easy for REA to effect this long overdue capital improvement program.

The additional capital expenditures required to complete the unfinished terminal projects listed in the enclosed schedule are estimated at $3,536,289. Moreover, as set forth in Exhibit 3 to the application, in addition to the $10,481,201 automotive program, REA's anticipated capital expenditures on new terminal projects for the fiscal year July 1964-June 1965 are $14,102,355, with the total comple-

tion costs of these new projects estimated at $27,323,355. At the present time, REA has no commitments for borrowings for such purposes in excess of $4,000,000.

The proceeds of the sale of REA Common Stock to Greyhound will be of immeasurable assistance to REA in financing its capital program and will be applied thereto.

2. *Possibility of Control of REA by Greyhound*

The question has been raised whether the acquisition of 20% of the outstanding Common Stock of REA and the election of 20% of REA's Board of Directors by Greyhound will give Greyhound control or the power to control REA. Greyhound will not have such control or power to control, for at least the following reasons:

First, the 20% interest to be acquired by Greyhound is, of course, a minority interest which in and by itself will not permit control or the power to control.

Secondly, the By-laws of REA, as amended, provide [fol. 41] that 18 out of the 25 directors of REA are to be nominated by the railroad stockholders and that only 20% of the directors (or five of the 25 directors) may be nominated by Greyhound. The other two directors are nominated by management.

In that connection, the history of REA must be remembered. During the existence of REA it has been controlled by common carriers by rail who have owned all the stock of REA and, through the Standard Express Operations Agreement, supplied REA with rail transport and shared in REA's profits and losses. The acquisition of stock and representation on the Board by a non-railroad stockholder —the first such stockholder in the history of REA—will not change the fact of railroad control.

In addition, the remaining stock of REA will not be completely scattered amongst small shareholders. As shown by the enclosed stockholders' list, there are only 60 stockholders of REA, all of which are railroad stockholders and some of which hold substantial interests.

It is also important to realize that representation on REA's Board is allotted by REA's charter and By-laws to three railroad districts as follows: the Eastern District (which holds 1,085,748 shares of REA) with the right to nominate 7 directors, the Western District (which holds 633,180 shares of REA) with the right to nominate 6 directors and the Southern District (which holds 280,260 shares of REA) with the right to nominate 5 directors. The railroad stockholders of REA are thus consolidated for voting purposes into three blocs for election of the Board, each of which blocs alone has the right to nominate at least as many directors as Greyhound under the By-laws. It is also important to remember that such method of electing directors to the Board of REA may not be changed without the vote of two-thirds of the stock issued and outstanding.

In summary, therefore, it seems clear that the acquisition by Greyhound of 20% of the stock of REA will give to Greyhound a 20% investment in REA and nothing more. Greyhound will not achieve the power to elect more than 20% of the Board of REA and will not be able to compel changes in the Standard Express Operations Agreement or in the charter or By-laws of REA or in REA's methods of operations. In no practical sense, therefore, could Greyhound be said to control or have the power to control REA. The question of whether or not control exists following purchase of capital stock is an issue of fact to be determined, not by artificial tests, but by the special circum-[fol. 42] stances in each case. Such control or power to control must be real and not based on conjecture or remote possibilities. Not only is the power to control not real in this case, but we believe it is also not even remotely possible.

If the Commission desires any further information or documentation, REA will be glad to supply the same.

Very truly yours,

Railway Express Agency, Incorporated, by William B. Johnson, President.

CAPITAL IMPROVEMENT PROGRAM

Expenditures January 1, 1960 - August 20, 1964

Terminals	Land Acct. 201	Acct. 202	Building Acct. 203	Acct. 204	Equipment Acct. 210	Total
Brentwood, N.Y.	$ 15,217	$ 93,880			$ 2,815	$ 111,912
Kalamazoo, Mich.	9,409	91,988			2,278	103,675
Philadelphia, Pa. (garage)	372,643	227,543			27,098	627,284
Riverhead, N.Y.	3,080	35,152			1,312	39,544
Syracuse, N.Y.	89,963	243,432			15,031	348,426
Atlanta, Ga.			$ 70,500			70,500
Evanston, Ill.	140,630	172,398				313,028
Oakland, Calif.			460,527		93,417	553,944
San Francisco, Calif.	513,337	1,022,316			29,188	1,564,841
San Carlos, Calif.	168,513	97,236			1,566	267,315
San Jose, Calif.	(Alterations)	4,390				4,390
Ardsley, N.Y.	349,763	289,411			21,946	661,120
Lakeland, Fla.			38,972		1,224	40,196
Chicago, Ill. (CB&Q Freight House)				$250,459		250,459
Clifton, N.J.	107,789	520,696			28,098	656,583
Houston, Tex.	103,330	256,588			12,497	372,415
New Orleans, La.			37,707			37,707
Kenosha-Racine Wis.	12,242	74,812				87,054
Sarasota, Fla.	10,810	54,816			2,021	67,647
Montgomery, Ala.			45,302		466	45,768
Pittsburgh, Pa.				356,768	318,978	675,746
Harrisburg, Pa.	169,687	446,714			52,683	669,084
New Haven, Conn	351,146	159,540			79,608	590,294
New London, Conn.	17,281	111,024			1,500	129,805
Stamford, Conn.	86,075	188,514			1,300	275,889
Danbury, Conn.	19,799	133,611			3,061	156,471
Manchester, N. H.	34,050	4,409				38,459
Akron, Ohio				42,551	13,350	55,901
Elmira, N.Y.	15,957	95,081			6,076	117,114
Hartford, Conn.	130,367	354,948			15,484	500,799

Terminals	Land Acct. 201	Acct. 202	Building Acct. 203	Acct. 204	Equipment Acct. 210	Total
Hornell, N. Y.	$ 4 941	$ 67 106	$	$	$ 2 762	$ 74 809
Olean, N. Y.	10 514	76 868			3 579	90 961
Morristown, N. J.	44 732	112 133			7 419	164 284
Scranton, Pa.	5 548	228 110			21 086	254 744
Middletown, N. Y.	5 927	97 765			3 022	106 714
Suffern-Nyack, N. Y.	50 326	110 907			3 248	164 481
Binghamton, N. Y.	17 679	243 999			12 527	274 205
Youngstown, Ohio					1 741	1 741
Baltimore, Md.				19 175	1 959	21 134
St. Petersburg, Fla.	36 209	99 453			300	135 962
Worcester, Mass.	39 335	212 375			8 905	260 615
Charlotte, N. C.			273 272		22 690	295 962
Philadelphia, Pa.				147 609	271 874	419 483
Lombard, Ill.	54 172	160 509			5 339	220 020
Chicago, Ill. (NWXT)					231 854	231 854
Atlanta, Ga. (Airport)			30 028		10 961	40 989
Green Bay, Wisc.			31 050		506	31 556
Garden City, L.I., N.Y.	175 400	389 072			36 674	601 146
Waukegan, Ill.	15 225	78 622				93 847
Rochester, N. Y.			69 957		3 729	73 686
Trenton, N. J.		32 328			27 902	60 230
Grand Rapids, Mich.	31 574	122 893			3 981	158 448
Owatonna, Minn.	5 042	31 800				36 842
Glens Falls, N. Y.	17 489	47 622			1 504	66 615
Janesville, Wisc.	3 500	62 042			1 783	67 325
Sioux City, Iowa			72 250		2 307	74 557
Bedford, Ohio	27 023	52 044			2 058	81 125
Santa Ana, Calif.	50 512	100 311			2 368	153 191
Allentown, Pa.	27 366	182 281			14 636	224 283
Doylestown, Pa.	16 406	91 515			5 457	113 378

Terminals	Land Acct. 201	Land Acct. 202	Building Acct. 203	Acct. 204	Equipment Acct. 210	Total
Norristown, Pa.	$ 37,025	$ 119,043			$ 5,901	$ 161,969
Pottsville, Pa.	31,979	96,190			5,315	133,484
Reading, Pa.	57,775	106,865			5,810	170,450
Norfolk, Va.			$ 241,732		19,435	261,167
Chicago, Ill. (QXT)				$ 4,512	217,571	222,083
Nashville, Tenn.			234,924		28,820	263,744
New Haven, Conn. (garage)		82,339				82,339
Wilmington, N. C.			54,708		1,055	55,763
Buffalo, N. Y.				150,397	29,785	180,182
Baltimore, Md.				7,150	47,816	54,966
Hammond, Ind.	21,605	161,445			9,974	193,024
Englewood, N. J.	87,375	271,405			13,045	371,825
Cincinnati, Ohio				91,466	242,405	333,871
Washington, D. C.					23,036	23,036
Springfield, Ill.	14,610	53,006			539	68,155
Long Island City, N.Y.				104,995		104,995
Atlanta, Ga.				71,055	5,697	76,752
Phoenix, Ariz.				85,149	4,124	89,273
Oshkosh, Wis.	2,388	226				2,614
Zanesville, Ohio	19,000	5,491				24,491
Kansas City, Mo.				7,675		7,675
Portland, Me.	11,081					11,081
Highland, N. Y.	1,000					1,000
Bangor, Me.	5,125	378				5,503
Cincinnati, Ohio				9,939		9,939
TOTAL	$3,648,971	$8,174,642	$1,660,929	$1,348,900	$2,103,496	$16,936,938

(23rd EDITION)

STOCKHOLDERS OF RAILWAY EXPRESS AGENCY, INCORPORATED

Eastern District

		Shares
Baltimore and Ohio Railroad Company (The)		85,116
Bangor and Aroostook Railroad Company		2,076
Boston and Maine Railroad		47,748
Canadian National Realties, Limited, in trust		12,456
Central Railroad Company of New Jersey (The)		22,836
Chesapeake and Ohio Railway Company (The)		35,292
Chicago & Eastern Illinois Railroad Company		10,380
Delaware and Hudson Railroad Corporation (The)		10,380
Erie-Lackawanna Railroad Company		76,812
Lehigh Valley Railroad Company		20,760
Maine Central Railroad Company		10,380
Monon Railroad		6,228
New Jersey and New York Railroad Company (The)		2,076
New York Central Railroad Company (The)	199,296	
Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The)	31,140	
Michigan Central Railroad Company (The)	64,356	
		294,792
New York, Chicago and St. Louis Railroad Company (The)		8,304
New York, New Haven and Hartford Railroad Company (The)		91,344
Norfolk and Western Railway Company		20,760
Pennsylvania Railroad Company (The)		261,576
Reading Company		24,912
Richmond, Fredericksburg & Potomac Railroad Company		14,532
Wabash Railroad Company		24,912
Western Maryland Railway Company		2,076
		1,085,748

Southern District

Atlantic Coast Line Railroad Company		41,520
Central of Georgia Railway Company		12,456
Clinchfield Railroad Company		2,076
Florida East Coast Railway Company		12,456
Gulf, Mobile and Ohio Railroad Company		12,456
Illinois Central Railroad Company		60,204
Louisville and Nashville Railroad Company		49,824
Norfolk Southern Railway Company		2,076
Seaboard Air Line Railroad Company		35,292
Southern Railway Company	39,444	
Alabama Great Southern Railroad Company (The)	4,152	
Cincinnati, New Orleans and Texas Pacific Railway Company (The)	6,228	
		49,824
Western Railway of Alabama (The)		2,076
		280,260

Western District

	Shares
Atchison, Topeka and Santa Fe Railway Company (The)	95,496
Burlington-Rock Island Railroad Company	-,076
Chicago, Burlington & Quincy Railroad Company	56,052
Chicago Great Western Railway Company	8,304
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	53,976
Chicago, Rock Island and Pacific Railroad Company	45,672
Colorado and Southern Railway Company (The)	6,228
Denver and Rio Grande Western Railroad Company (The)	12,456
Great Northern Railway Company	31,140
Kansas City Southern Railway Company (The)	6,228
Lake Superior & Ishpeming Railroad Company	2,076
Missouri-Kansas-Texas Railroad Company	24,912
Missouri Pacific Railroad Company	41,520
Northern Pacific Railway Company	24,912
St. Louis-San Francisco Railway Company	29,064
St. Louis Southwestern Railway Company 4,152	
St. Louis Southwestern Railway Company of Texas 4.152	8,304
Soo Line Railroad Company	14,532
Southern Pacific Company	95,496
Spokane, Portland and Seattle Railway Company	2,076
Texas and Pacific Railway Company (The)	16,608
Union Pacific Railroad Company	51,900
Western Pacific Railroad Company (The)	4,152
	633,180

[fol. 47]

[fol. 48]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

F. D. No. 23324

Application of RAILWAY EXPRESS AGENCY Under Sections 20a and 214 for Authority to Issue Securities

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PETITION OF FREIGHT FORWARDERS INSTITUTE FOR RIGHT TO INTERVENE AND FOR A FORMAL HEARING IN THE MATTER —Filed October 20, 1964

[fol. 49] Comes now Freight Forwarders Institute[1] to state that it has a vital interest in the subject matter involved in the above-entitled proceeding; that it desires to intervene therein and to be heard and considered in all respects as a party thereto; and to request that formal hearing be set at which all of the facts may be elicited for the consideration of the Commission. As grounds for such petition it is respectfully shown:

I

The proposal here is to issue 500,000 shares of authorized but unissued stock in REA and to sell such shares to The

[1] Petitioner, the Freight Forwarders Institute is a voluntary nonprofit association of freight forwarders with offices at Room 401 Continental Bldg., Washington, D.C. All of petitioner's members are freight forwarders operating pursuant to permits issued under part IV of the Interstate Commerce Act. One of the purposes of the Institute is to protect, promote, foster, and advance the interests of the members, and to that end it is empowered to and does participate in administrative and judicial proceedings wherein issues involving freight forwarders are involved.

[File endorsement omitted]

[fol. 50] Greyhound Corporation for the sum of $10,000,000. The application shows that there are presently issued some 1,999,188 shares, owned by some 60 railroads; that issuance of the 500,000 shares contemplated by the application will bring the total outstanding shares to 2,499,188 (2,500,000) shares; that Greyhound will thus become owner of 20% of REA's outstanding stock and as such owner will appoint five members to the Board of Directors.

II

It is our contention, and it will be proved upon hearing, that despite REA's self-serving protestations to the contrary, this proposal is a mere launching pad for the lodgement in Greyhound of control of REA and it should be treated accordingly. Whether or not control is effectuated by this first step, and we think the facts will show that it is, the next step has already been charted.

REA in a supplemental pleading dated October 12, 1964, makes much of the facts that: Only the sale and ownership of 20 percent of the stock is contemplated; that ownership of the remaining 80 percent is in railroad hands; and that control of REA through ownership of stock is therefore out of the question.

This argument would be more convincing if we could assume (a) that stock ownership is the *only* means by which [fol. 51] the power to exercise control may manifest itself[2] and (b) that the railroad owners would continue to vote the remaining shares as a unit. Obviously, REA is in no position to insure such block voting on the part of the railroads.

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[2] A proposition which the Commission flatly rejected in *United States Freight Co.—Investigation of Control,* 45 M.C.C. 352, where it said at 358:

> Ownership or possession of a carrier's stock is only one of many means by which control of it may be exercised in violation of the statute.

III

At page 3 of REA's supplemental pleading this statement appears:

> In summary, therefore, it seems clear that the acquisition by Greyhound of 20% of the stock of REA will give to Greyhound a 20% investment in REA *and nothing more.* Greyhound will not achieve the power to elect more than 20% of the Board of REA *and will not be able to compel changes* in the Standard Express Operations Agreement or in the charter or By-Laws of REA *or in REA's methods of operation.*

Of what avail, then, is the objective expressed as follows on page 7 of the application:

> Applicant further believes that the issuance of 500,000 shares of applicant's common stock to Greyhound will give Greyhound a sufficient equity in the applicant *to provide a working basis* which will justify the *applicant and Greyhound* in going forward *with the study of,* and ultimately *entering into an agreement* with respect to the consolidation of certain operating functions and facilities with a view of effecting economies • • •. (Emphasis added).

[fol. 52] Would applicant have the Commission believe that this "working basis" and "study" are to be mere exercises in futility?

That such a result is not contemplated is made clear in paragraph (e) of page 2 of Exhibit 4 which is an agreement dated October 1, 1964, between REA and Greyhound which provides:

> The Greyhound shall offer to purchase up to 1,000,000 shares of the common stock of REA *from present shareholders* at a price of $20 per share cash. Such offer to purchase will remain open and in full force and effect for a period of sixty days following the closing

date of the transaction involving the 500,000 authorized but unissued shares of REA. (Emphasis added).

We are not lulled into any false sense of security by the fact that the present shareholders have first refusal on any outstanding stock offered for purchase. We have no way of knowing whether or not a promise or promises to work in concert with Greyhound to bring about the elimination of such right played an important part in motivating the purchase of the 500,000 shares. These are things which can be developed only upon a hearing.

IV

We must be forever conscious of the fact that the Commission gave tentative approval of the so-called Standard Operating Agreement of 1959, only from the standpoint of pooling. We respectfully submit that to approve a pooling arrangement as between REA as an *alter ego* of the railroads, and its proprietary lines, is far different from ap- [fol. 53] proval of a pooling arrangement as between the railroads, on the one hand, and an REA controlled[3] by Greyhound, on the other.

The impact of such an arrangement on the forwarding industry would be catastrophic. As the Commission well knows, REA is permitted to utilize the railroads as underlying carriers on an agreed basis which contemplates the return of out-of-pocket costs. By way of contrast, forwarders may utilize railroads only on the basis of their published tariff rates. To turn REA and Greyhound loose to conduct forwarding operations under such an imbalance of underlying costs would spell the end of the forwarding business, as we know it today.

It is no answer to say that REA, as *now* constituted, could not technically qualify as a freight forwarder under

[3] And when we speak of control here, we mean the power to exercise control.

the present statutory definition.[4] We are concerned with what a person does more than with mere nomenclature. The Commission must be aware of the fact that REA, beginning in the recent past, is departing more and more from its traditional role in the general scheme of transportation and is entering the domain of a hauler of general freight in volume lots[5] as distinguished from "express [fol. 54] matter." At page 4 of a shipping directory it issues for the information of the shipping public this statement appears in connection with reference to a certain tariff:

> Applies on a wide variety of commodities * * * (naming a number of specific items) and many other commodities providing for low competitive rates and charges which ordinarily are lower per individual shipment for aggregates beginning at 300, 1500, 2500, and 10,000 pounds, moving from one shipper to one or more consignees to one or more destinations. On some commodities there are rate columns for shipments aggregating 15,000 and 30,000 pounds.

There can be no question that when REA "consolidates" and "breaks bulk" on shipments totaling as much as 30,000 pounds, and uses railroads (or motor carriers) for underlying line-haul transportation it is functioning in the similitude of a freight forwarder and should be regulated accordingly.

The legal definition of a freight forwarder, as heretofore indicated, excludes carriers subject to Parts I, II, and III from its reach. But by virtue of what fact is REA subject to Part I? An express company is not defined in Part I,

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[4] This because Section 402(a)(5) provides that:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to Part I, II, or III of this Act) holds itself out * * *

and an "express agency" is subject to Parts I and II.

[5] Docket No. 33977—*Freight, All Kinds L.C.L., Container Charges—U.S.A.*, now pending, is a case in point.

and is not required to obtain authority from the Commission in order to operate. So long as REA is the *alter ego* of the railroads its regulation under Part I is not likely to be questioned, but if control passes to Greyhound the situation will be different. If REA abandons its traditional role as an express carrier, as we have shown that it is rapidly doing, and becomes a consolidator of general freight, compensating the railroads on a car-foot mile basis, and finally, ceases to be an exclusive instrumentality of [fol. 55] the railroads, we assert that it will cease to be a carrier subject to part I and will become a carrier subject to part IV of the Act. But before it can operate as a freight forwarder it will be necessary for REA to obtain a permit under part IV of the Act.

Conclusion

We respectfully submit that the broad and important issues raised by this application should not be resolved by the Commission on the bare facts and allegations set forth in the documents filed by REA. We respectfully request that the matter be set for hearing for the purpose of exploring fully the question of control of REA by Greyhound which is implicit in the application; the pooling arrangement approved in 1959 in the light of the changed circumstances and conditions which would prevail if the application is approved; and other questions raised by this petition.

Respectfully submitted,

Freight Forwarders Institute, By: Harry C. Ames, 527 Transportation Bldg., Washington, D.C., 20006; Giles Morrow, 1012 Fourteenth St., N.W., Washington, D. C., 20005.

Certificate of Service (omitted in printing).

[fol. 57] [File endorsement omitted]

[fol. 58]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

PETITION FOR LEAVE TO INTERVENE AND PROTEST OF SOUTHERN PACIFIC COMPANY—Filed October 20, 1964

Comes now petitioner and protestant, Southern Pacific Company, and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding, and desires to intervene in and become a party to said proceeding and to register its protest in opposition to the relief sought, and as grounds for said proposed intervention and protest, states as follows:

I.

Petitioner and protestant is a corporation created and existing under and by virtue of the laws of the State of Delaware and is a common carrier by railroad subject to the Interstate Commerce Act. Applicant, Railway Express Agency, Incorporated, (hereinafter referred to as REA), is authorized to issue 2,576,000 shares of common stock. Applicant, REA, now has issued and outstanding 1,999,188 shares of said common stock. Petitioner and protestant presently owns 95,496 shares of the common stock of applicant, REA.

[fol. 59]

II.

Applicant, REA, seeks authority to issue 500,000 shares of authorized but unissued stock to The Greyhound Corporation. As disclosed by the application on file herein, The Greyhound Corporation will also have the right to purchase up to 1,000,000 shares of the common stock of REA from present shareholders at a price of $20.00 per share, cash.

III.

Petitioner and protestant alleges that the issuance of 500,000 shares of stock to The Greyhound Corporation by the REA is not for a lawful object within its corporate purposes and is not compatible with the public interest, and is not necessary or appropriate for or consistent with the proper performance by REA of service to the public as a common carrier and that such issuance will impair its ability to perform that service. Petitioner and protestant also alleges that such issuance is not reasonably necessary and appropriate for such purpose.

IV.

Petitioner and protestant believes and upon such ground alleges that the relief sought in the application on file is an attempt to consummate control of REA by The Greyhound Corporation without Section 5 approval and authority from this Commission. Petitioner and protestant expects to file a formal complaint making such allegations and asking for consolidation of that proceeding with the instant proceeding.

[fol. 60] Wherefore said petitioner and protestant prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted. Petitioner and protestant further prays that a hearing be held in this matter to determine whether the statutory requirements of Section 20a(2) are met, and further prays that because of the matters alleged and the matters that will be developed at the hearing, when held, that the Commission refuse to grant Railway Express Agency, Incorporated, authority to issue to The Greyhound Corporation the 500,000 shares of au-

thorized but unissued stock and refuse to grant any other or different authority in the premises.

Respectfully submitted,

Southern Pacific Company, By B. F. Biaggini, Executive Vice-President.

Dated this 20th day of October, 1964.

Correspondence with respect to this Petition and Protest should be addressed to:

Mr. Charles W. Burkett, General Solicitor, Southern Pacific Company, 65 Market Street, San Francisco, California 94105.

(Seal)

[fol. 61] *Duly sworn to by B. F. Biaggini, jurat omitted in printing.*

[fol. 62] Certificate of Service (omitted in printing).

[fol. 63]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITION FOR LEAVE TO INTERVENE AND PROTEST OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—Filed October 22, 1964

Comes now petitioner and protestant, The Denver and Rio Grande Western Railroad Company, and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding, and desires to intervene in and become a party to said proceeding and to register its protest in opposition to the relief sought, and as grounds for said proposed intervention and protest, states as follows:

[File endorsement omitted]

I.

Petitioner and protestant is a corporation created and existing under and by virtue of the laws of the State of Delaware and is a common carrier by railroad subject to the Interstate Commerce Act. Applicant, Railway Express Agency, Incorporated, (hereinafter referred to as REA), is authorized to issue 2,576,000 shares of common stock. Applicant, REA, now has issued and outstanding 1,999,188 shares of said common stock. Petitioner and protestant presently owns 12,456 shares of the common stock of applicant REA.

II.

Applicant, REA, seeks authority to issue 500,000 shares [fol. 64] of authorized but unissued stock to The Greyhound Corporation. As disclosed by the application on file herein, The Greyhound Corporation will also have the right to purchase up to 1,000,000 shares of the common stock of REA from present shareholders at a price of $20.00 per share, cash.

III.

Petitioner and protestant alleges that the issuance of 500,000 shares of stock to The Greyhound Corporation by the REA is not for a lawful object within its corporate purposes and is not compatible with the public interest, and is not necessary or appropriate for or consistent with the proper performance by REA of service to the public as a common carrier and that such issuance will impair its ability to perform that service. Petitioner and protestant also alleges that such issuance is not reasonably necessary and appropriate for such purpose.

IV.

Petitioner and protestant believes and upon such ground alleges that the relief sought in the application on file is an attempt to consummate control of REA by The Grey-

hound Corporation without Section 5 approval and authority from this Commission. Petitioner and protestant expects to file a formal complaint making such allegations and asking for consolidation of that proceeding with the instant proceeding.

Wherefore said petitioner and protestant prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, [fol. 65] produce and cross examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted. Petitioner and protestant further prays that a hearing be held in this matter to determine whether the statutory requirements of Section 20a(2) are met, and further prays that because of the matters alleged and the matters that will be developed at the hearing, when held, that the Commission refuse to grant Railway Express Agency, Incorporated, authority to issue to The Greyhound Corporation the 500,000 shares of authorized but unissued stock and refuse to grant any other or different authority in the premises.

Respectfully submitted,

The Denver and Rio Grande Western Railroad Company, By R. K. Bradford, Senior Vice President.

Dated this 20th day of October, 1964.

Correspondence with respect to this Petition and Protest should be addressed to:

Mr. T. A. White, General Solicitor, The Denver and Rio Grande Western Railroad Company, P. O. Box 5482, Denver, Colorado 80217.

[fol. 66] *Duly sworn to by R. K. Bradford, jurat omitted in printing.*

Certificate of Service (omitted in printing).

[fol. 67]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITION OF TRANSCONTINENTAL BUS SYSTEM, INC., ET AL. SEEKING LEAVE TO INTERVENE—Filed October 22, 1964

[fol. 68] Now come Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Bayshore Buslines, Inc., Continental Bus System, Inc., Continental Crescent Lines, Inc., Continental Panhandle Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Inc., Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Bus Lines, Inc., and Muscatine, Davenport and Clinton Bus Company, Petitioners herein, and for cause would show to the Commission as follows:

I.

Intervention is sought pursuant to Section 56.3(d) of Title 49 of the Code of Federal Regulations, and Peti-
[fol. 69] tioners' position is in opposition to the authority sought by Applicant.

Transcontinental Bus System, Inc., hereinafter referred to as Transcontinental, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-109780 and subs thereunder. Transcontinental is a Delaware corporation, with principal offices located at 315 Continental Avenue, Dallas, Dallas County, Texas.

[File endorsement omitted]

American Buslines, Inc., hereinafter referred to as American, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-2890 and subs thereunder. American is a Delaware corporation, with principal offices located at 1805 Leavenworth Street, Omaha, Nebraska.

Arkansas Motor Coaches, Ltd., Inc., hereinafter referred to as Arkansas, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-60026 and subs thereunder. Arkansas is an Arkansas corporation, with principal offices located at 106 East Markham, Little Rock, Arkansas.

Bayshore Buslines, Inc., hereinafter referred to as Bayshore, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by [fol. 70] the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-11929 and subs thereunder. Bayshore is a Texas corporation, with principal offices located at 425 Bolton Avenue, Alexandria, Louisiana.

Continental Bus System, Inc., hereinafter referred to as Continental, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-107586 and subs thereunder. Continental is a Tennessee corporation, with principal offices located at 315 Continental Avenue, Dallas, Texas.

Continental Crescent Lines, Inc., hereinafter referred to as Crescent, is a common carrier of passengers, their bag-

gage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Public Convenience and Necessity, No. MC-114271 and subs thereunder. Crescent is a Delaware corporation, with principal offices located at 425 Bolton Avenue, Alexandria, Louisiana.

Continental Panhandle Lines, Inc., hereinafter referred to as Panhandle, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-8742 and subs thereunder. Panhandle is a Texas corporation, with principal offices located at 400 Monroe Street, Amarillo, Texas.

Continental Southern Lines, Inc., hereinafter referred to as Southern, is a common carrier of passengers, their bag-
[fol. 71] gage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-29957 and subs thereunder. Southern is a Louisiana corporation, with principal offices located at 425 Bolton Avenue, Alexandria, Louisiana.

Continental Tennessee Lines, Inc., hereinafter referred to as Tennessee, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-55312 and subs thereunder. Tennessee is a Delaware corporation, with principal offices located at 418 Fifth Avenue, South, Nashville, Tennessee.

Denver-Colorado Springs-Pueblo Motorway, hereinafter referred to as D.C.S.P., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in

Certificates of Convenience and Necessity, No. MC-28462 and subs thereunder. D.C.S.P. is a Colorado corporation, with principal offices located at 1669 Broadway, Denver, Colorado.

Denver-Salt Lake-Pacific Stages, Inc., hereinafter referred to as D.S.L.P., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-1097 and subs thereunder. D.S.L.P. is a Colorado corporation, with principal offices located at 1669 Broadway, Denver, Colorado.

[fol. 72] Continental Pacific Lines, Inc., hereinafter referred to as Pacific, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-89037 and subs thereunder. Pacific is a California corporation, with principal offices located at 1501 South Central Avenue, Los Angeles, California.

Midwest Buslines, Inc., hereinafter referred to as Midwest, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-61616 and subs thereunder. Midwest is a Delaware corporation, with principal offices located at 433 West Washington Avenue, North Little Rock, Arkansas.

Muscatine, Davenport and Clinton Bus Co., hereinafter referred to as M. D. & Co., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC 107562 and subs thereunder. M.D.&C is an Iowa corporation, with

principal offices located at 1805 Leavenworth Street, Omaha, Nebraska.

Smoky Mountain Stages, Inc., hereinafter referred to as Smoky, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-61598 and subs there- [fol. 73] under. Smoky is a North Carolina corporation, with principal offices located at 417 West Fifth Street, Charlotte, North Carolina.

Tennessee Trailways, Inc., hereinafter referred to as Tennessee Trailways, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-8500 and subs thereunder. Tennessee Trailways is a Virginia corporation, with principal offices located at 710 Sevier Avenue, Knoxville, Tennessee.

Union Bus Lines, Inc., hereinafter referred to as Union, is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-57298 and subs thereunder. Union is a Texas corporation, with principal offices located at 315 Continental Avenue, Dallas, Texas.

II.

Docket No. MC-F-23324, filed October 7, 1964, is the application of Railway Express Agency, Inc., for authority, under Sections 20a and 214 of the Interstate Commerce Act, to issue securities. Applicant proposes to issue 500,000 shares of its authorized but unissued shares of common stock to The Greyhound Corporation for a total price of $10,000,000.

The Greyhound Corporation is a holding company which [fol. 74] controls the largest motorbus company in the world, i.e. Greyhound Lines, Inc. (The Greyhound Corporation and Greyhound Lines, Inc. will hereinafter be referred to collectively as "Greyhound.") Railway Express Agency, Inc., (hereinafter referred to as "R.E.A.") is the world's largest express company.

Under this proposal Greyhound would acquire 20% of the stock of R.E.A., and this, in connection with other aspects of the application, present matters of grave concern to the Petitioners. The Applicant has stated in its application that the proposal will "provide a working basis" for R.E.A. and Greyhound "entering into an agreement with respect to, *the consolidation of certain operating functions and facilities* . . ." (Page 7 application. Emphasis added) No motorbus company could hope to meet the competition offered by a consolidation of the R.E.A. and Greyhound terminal facilities and operations. It would, in effect, destroy all competition in the package express phase of motorbus transportation, and would, therefore, not be compatible with the public interest.

The present stockholders of R.E.A. have a right of first refusal for the purchase of all newly issued shares of R.E.A. and it is to be assumed (although the Application does not so state) that the new shares sold to Greyhound would carry the same right. Once this stock is in the hands of Greyhound with right of first refusal on future stock to be issued, Greyhound's competitors (particularly Petitioners who constitute Greyhound's chief competition) are placed in a serious position of competitive jeopardy with [fol. 75] no possibility of being able to remedy the situation created by the amalgamation of Greyhound and R.E.A.

This application raises numerous issues relating to proper regulatory policy as related to the public interest; the maintenance of sound economic conditions in transportation and among the several carriers; the rendering of transportation service without unjust discriminations, undue preferences or advantages or unfair or destructive com-

petitive practices, and the preservation of the inherent advantages of the several modes of transportation. They are here presented within the context of this application as a matter of first instance. As presented these matters are sui generis since such an amalgamation by a bus company and an express company has never been attempted under the Interstate Commerce Act.

Petitioners allege that the issuance of these shares by R.E.A. to be sold to Greyhound is not in the public interest and is neither necessary nor appropriate for, or consistent with the proper performances by R.E.A. of service to the public as a common carrier.

III.

Petitioners respectfully submit that the averments contained herein are pertinent to the issues to be presented by Applicant and do not unduly broaden said issues.

Petitioners further submit that the public interest demands that an oral hearing be held on this application and Petitioners request that the application be set for oral hearing. Such hearing is required in order that Petitioners may cross-examine witnesses of the Applicant and in order that they may properly present evidence in rebuttal of Applicant's evidence.

[fol. 76] Wherefore, Petitioners pray that the Commission permit them to intervene in and become a party to this proceeding, and that their request for oral hearing be granted.

Respectfully submitted,

Transcontinental Bus System, Inc. et al., By: Carl B. Callaway, Warren A. Goff, D. Paul Stafford, 315 Continental Avenue, Dallas, Texas, Their Attorneys.

Certificate of Service (omitted in printing).

[fol. 77] [File endorsement omitted]

[fol. 78]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 3324

[Title omitted]

JOINT PETITION FOR LEAVE TO INTERVENE AND PROTEST AND REQUEST FOR ORAL HEARING OF NATIONAL TRAILWAYS BUS SYSTEM—Filed October 22, 1964

Comes now National Trailways Bus System and respectfully petitions the Commission for leave to intervene in the above-entitled proceeding. Simultaneously, National Trailways Bus System requests acceptance for filing of this its protest to the approval of said application and further petitions the Commission to assign the proceeding for an oral hearing.

I.

National Trailways Bus System is an association of approximately forty-one member companies who are engaged in the transportation of passengers and their baggage, and *express,* mail and newspapers in interstate or foreign commerce. The operations of these companies extend throughout the United States from coast to coast and border to border. The primary purpose and function of National Trailways Bus System is to provide more effective competition to The Greyhound Corporation in the transportation not only of passengers, but also in the transportation of express. The Commission has, on numerous occasions over the last 25 years, recognized in its formal reports the position of National Trailways Bus System as a competitor [fol. 79] to The Greyhound Corporation and, in the interest of brevity, those findings and conclusions will not be referred to in detail herein.

II.

The member carriers of National Trailways Bus System consider the transportation of express throughout the United States as a vital and indispensable source of revenue. In many instances, the transportation of express by these member carriers will provide the difference between a profit and a loss in the over all transportation activities of these carriers. In those instances, therefore, it is imperative that the express traffic which these carriers are now handling be continued or otherwise substantial deficits will surely result thereby impairing the ability of many member carriers to continue serving the public.

III.

The Greyhound Corporation is the only fully integrated nationwide common carrier of passengers. Its dominance in the field of motor bus transportation has long been recognized. It already enjoys a substantial and marked advantage in the transportation of passengers and express over other motor bus operators in the United States by reason of its single ownership, which thereby permits it to route traffic to its own advantage and to, in effect, freeze out carriers outside of The Greyhound Corporation if it so desires.

The Greyhound Corporation now proposes to strengthen and extend its dominance in the filed of motor bus operations by the ultimate acquisition of Railway Express [fol. 80] Agency, Incorporated, which would give it a virtual and absolute monopoly in the field of express transportation. It is the position of National Trailways Bus System that such acquisition in whole or in part by The Greyhound Corporation of the operating rights and properties of Railway Express Agency, Inc., would result in destructive competition; would create a monopoly in The Greyhound Corporation contrary to the public interest and would result in the destruction or substantial impairment of the ability of many carriers outside of The Greyhound

Corporation, including those carriers members of National Trailways Bus System, to continue serving the public.

IV.

It would appear that The Greyhound Corporation now proposes to acquire approximately 20% of the outstanding common capital stock of Railway Express Agency, Incorporated. Under these circumstances, serious question may arise as to whether The Greyhound Corporation would in fact acquire control of Railway Express Agency, Incorporated, or whether Railway Express Agency, Incorporated, would be operated in a common interest and for the benefit of The Greyhound Corporation. The Commission has held in a long series of cases that the mere holding of a minority interest does not necessarily mean that control or operation in a common interest has not thereby been effectuated. Only by an oral hearing can the full circumstances and details regarding the possibility of control or operation in a common interest be determined.

[fol. 81] Wherefore, National Trailways Bus System respectfully urges the Commission to approve this petition for the purposes indicated in the opening paragraph hereof.

Respectfully submitted,

Wilson, Woods & Villalon, James E. Wilson, 716 Perpetual Building, 1111 E Street, N. W., Washington 4, D. C., General Counsel for National Trailways Bus System.

Date: October 22, 1964.

Certificate of Service (omitted in printing).

[fol. 82]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITION FOR LEAVE TO INTERVENE AND PROTEST OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—Filed October 22, 1964

Comes now petitioner and protestant, The Atchison, Topeka and Santa Re Railway Company, and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding, and desires to intervene in and become a party to said proceeding and to register its protest in opposition to the relief sought, and as grounds for said proposed intervention and protest, states as follows:

I.

Petitioner and protestant is a corporation created and existing under and by virtue of the laws of the State of [fol. 83] Kansas and is a common carrier by railroad subject to the Interstate Commerce Act. Applicant, Railway Express Agency, Incorporated (hereinafter referred to as REA) is authorized to issue 2,576,000 shares of common stock. Applicant, REA, now has issued and outstanding 1,999,188 shares of said common stock. Petitioner and protestant presently owns 95,496 shares of the common stock of applicant, REA.

II.

Applicant, REA, seeks authority to issue 500,000 shares of authorized but unissued stock to The Greyhound Corporation. As disclosed by the application on file herein, The Greyhound Corporation will also have the right to purchase up to 1,000,000 shares of the common stock of

[File endorsement omitted]

REA from present shareholders at a price of $20.00 per share, cash.

III.

Petitioner and protestant alleges that the issuance of 500,000 shares of stock to The Greyhound Corporation by the REA is not for a lawful object within its corporate purposes and is not compatible with the public interest, and is not necessary or appropriate for or consistent with the proper performance by REA of service to the public [fol. 84] as a common carrier and that such issuance will impair its ability to perform that service. Petitioner and protestant also alleges that such issuance is not reasonably necessary and appropriate for such purpose.

Wherefore, said petitioner and protestant prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted. Petitioner and protestant further prays that a hearing be held in this matter to determine whether the statutory requirements of Section 20a(2) are met, and further prays that because of the matters alleged and the matters that will be developed at the hearing, when held, that the Commission refuse to grant Railway Express Agency, Incorporated, authority to issue to The [fol. 85] Greyhound Corporation the 500,000 shares of authorized but unissued stock and refuse to grant any other or different authority.

Respectfully submitted,

The Atchison, Topeka and Santa Fe Railway Company, By R. D. Shelton, Vice President—Operations.

Dated October 21, 1964.

Correspondence with respect to this Petition and Protest should be addressed to:

Starr Thomas, General Counsel, The Atchison, Topeka and Santa Fe Railway Company, 80 East Jackson Blvd., Chicago, Illinois 60604.

[fol. 86] *Duly sworn to by R. D. Shelton, jurat omitted in printing.*

[fol. 87] Certificate of Service (omitted in printing).

[fol. 88] [File endorsement omitted]

[fol. 89]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. MC-F-23324

[Title omitted]

PETITION OF TRANSCONTINENTAL BUS SYSTEM, INC., ET AL. TO REQUIRE FILING UNDER SECTION 5, INTERSTATE COMMERCE ACT, AND TO CONSOLIDATE—Filed December 2, 1964

Now come Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Bayshore Buslines, Inc., Continental Bus System, Inc., Continental Crescent Lines, Inc., Continental Panhandle Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Inc., Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Inc., Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Bus Lines, Inc., and Muscatine, Davenport and Clinton Bus Company, Petitioners herein, and for cause would show to the Commission as follows:

I.

This is the application of Railway Express Agency, Inc. (hereinafter referred to as "R.E.A.") for authority, under

[fol. 90] Sections 20a and 214 of the Interstate Commerce Act, to issue securities. Applicant proposes to issue 500,000 shares of its authorized but unissued shares of common stock to The Greyhound Corporation (hereinafter referred to as "Greyhound") for a total price of $10,000,000.

The Petitioners herein are filing simultaneously with this Petition, a Petition Seeking Leave to Intervene. The dates of incorporation, address and Interstate Commerce Commission authority of Petitioners is fully described in the Petition Seeking Leave to Intervene, and will not be reiterated here for the sake of brevity.

II.

Petitioners move that R.E.A. and Greyhound be required to further file in connection with this transaction an application under Section 5 of the Interstate Commerce Act, to be considered in conjunction with its Application for Authority to Issue Securities under Sections 20a and 214 of said Act.

The major policy and fact issues that should be considered before this Commission permits Greyhound to consolidate facilities and operations with R.E.A. are many and varied, and cannot properly be presented in a hearing governed by the issues pertinent to Sections 20a and 214 of the Act.

The acquisition by Greyhound of 20% of R.E.A. common stock would not normally be considered as control, but, such acquisition does present a serious question, to-wit: "Whether Greyhound should be allowed to consolidate its facilities and operations with those of R.E.A." A proper determination of this question will require the presentation [fol. 91] and consideration of broad issues—issues pertaining to the National Transportation Policy. The issues pertinent under Sections 20a and 214 are limited and narrow and are insufficient for this purpose.

It may be fairly stated that this is a petition to broaden the issues which applicant chooses to raise at this time, but it does not broaden the issues which the Commission should require to be raised under the Act. Petitioners submit that

the issues they seek to raise are vitally important and pertinent in light of the declared National Transportation Policy. If R.E.A. and Greyhound be required to file an application under Section 5 of the Interstate Commerce Act, such broad policy questions and issues may properly be presented and considered in reaching a proper determination of these questions and issues. Unlike Sections 20a and 214, Section 5 does allow, and in fact makes specific provision for, the presentation of the issues necessary for a determination of the question as to whether or not Greyhound should be allowed to consolidate its facilities and operations with those of R.E.A.

III.

Petitioners have requested, in their Petition Seeking Leave to Intervene, an oral hearing so that they may properly cross-examine witnesses of the Applicant, and in order to properly present evidence in rebuttal of Applicants' evidence. Petitioners now reaffirm this request for oral hearing, and further request that the Application for Authority to Issue Securities and the application under Section 5, if [fol. 92] this Petition be granted and such application required, be consolidated and heard on a common record. Such consolidation will expedite the proceedings to the benefit of all parties.

Wherefore, Petitioners pray that Applicant be required by Order of the Commission to file an application under Section 5 of the Interstate Commerce Act; that such application be consolidated and heard on a common record with Applicants' pending Application for Authority to Issue Securities; and that their request for oral hearing be granted.

Respectfully submitted,

Transcontinental Bus System, Inc., et al., By: Carl B. Callaway, Warren A. Goff, D. Paul Stafford, 315 Continental Avenue, Dallas, Texas 75207, Their Attorneys.

Certificate of Service (omitted in printing).

[fol. 93] [File endorsement omitted]

[fol. 94]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

JOINT PETITION FOR LEAVE TO INTERVENE, AND PROTEST, OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS—Filed October 28, 1964

Come now petitioners and protestants, St. Louis Southwestern Railway Company and St. Louis Southwestern Railway Company of Texas, and jointly represent that they have an interest in the matters in controversy in this proceeding; that they hereby protest the granting of the authority sought by applicant herein; that they desire to intervene in and become parties to said proceeding in opposition to the relief sought; and as grounds for such intervention and protest, respectfully state:

I.

St. Louis Southwestern Railway Company is a corporation organized and existing under the laws of the State of Missouri and is a common carrier by railroad subject to the Interstate Commerce Act. St. Louis Southwestern Railway Company of Texas is a corporation organized and existing under the laws of the State of Texas and is a common carrier by railroad subject to the Interstate Commerce Act. St. Louis Southwestern Railway Company owns or operates property situated in the States of Illinois, Missouri, Arkansas, Tennessee, Louisiana and Texas. St. Louis Southwestern Railway Company of Texas, all of whose [fol. 95] property is situated in the State of Texas, is a

wholly-owned subsidiary of St. Louis Southwestern Railway Company, which operates such property under a lease approved by this Commission.

II.

Each of the petitioners and protestants, St. Louis Southwestern Railway Company and St. Louis Southwestern Railway Company of Texas, owns 4,152 shares of the outstanding common capital stock of applicant, Railway Express Agency, Incorporated (hereinafter referred to as REA). REA is authorized to issue 2,576,000 shares of common stock and presently has issued and outstanding a total of 1,999,188 shares of its authorized common stock.

III.

By the application filed herein, REA seeks authority under Sections 20a and 214 of the Interstate Commerce Act to issue 500,000 shares of its authorized but unissued common capital stock to The Greyhound Corporation. The application further discloses that The Greyhound Corporation also would have the right to purchase up to 1,000,000 shares of the common stock of REA from present stockholders at a cash price of $20.00 per share.

IV.

Petitioners and protestants believe and upon such ground allege that the proposed issue of 500,000 shares of common stock to The Greyhound Corporation by REA is not for a lawful object within its corporate purposes; is not compatible with the public interest; is not necessary or appropriate for or consistent with the proper performance by REA of service to the public as a common carrier and will [fol. 96] impair its ability to perform that service; is not reasonably necessary and appropriate for such purpose; and that seeking approval of the transaction proposed by the application filed in this docket is an attempt to effect control of REA by The Greyhound Corporation without

obtaining approval and authorization therefor from the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act.

Wherefore, these petitioners and protestants respectfully pray (1) that they be granted leave to intervene and be treated as parties protestant hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted; and (2) that a hearing be held in this proceeding to determine whether the requirements of Section 20a will be met, and, pending such hearing, the Commission withhold granting the authority sought by applicant in this proceeding or any other or different authority in the premises.

Respectfully submitted,

St. Louis Southwestern Railway Company, By H. J. McKenzie, President.

St. Louis Southwestern Railway Company of Texas, By H. J. McKenzie, President.

Dated this 23rd day of October, 1964.

[fol. 97] *Duly sworn to by H. J. McKenzie, jurat omitted in printing.*

[fol. 98] Certificate of Service (omitted in printing).

[fol. 99]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITION FOR LEAVE TO INTERVENE AND PROTEST OF THE MISSOURI PACIFIC RAILROAD—Filed November 2, 1964

Comes now petitioner and protestant, The Missouri Pacific Railroad Company, and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding, and desires to intervene in and become a party to said proceeding and to register its protest in opposition to the relief sought, and as grounds for said proposed intervention and protest, states as follows:

I.

Petitioner and protestant is a corporation created and existing under and by virtue of the laws of the State of Missouri and is a common carrier by railroad subject to the Interstate Commerce Act. Applicant, Railway Express [fol. 100] Agency, Incorporated (hereinafter referred to as REA) is authorized to issue 2,576,000 shares of common stock. Applicant, REA, now has issued an outstanding 1,999,188 shares of said common stock. Petitioner and protestant presently directly owns 41,520 shares of the common stock of applicant, REA, and indirectly, through its subsidiary The Texas and Pacific Railway Company, owns an additional 16,608 of such shares.

II.

Applicant, REA, seeks authority to issue 500,000 shares of authorized but unissued stock to The Greyhound Corporation. As disclosed by the application on file herein, The

Greyhound Corporation will also have the right to purchase up to 1,000,000 shares of the common stock of REA from present shareholders at a price of $20.00 per share, cash.

III.

Petitioner and protestant alleges that the issuance of 500,000 shares of stock to The Greyhound Corporation by the REA is not for a lawful object within its corporate purposes and is not compatible with the public interest, and is not necessary or appropriate for or consistent with the proper performance by REA of service to the public as a common carrier and that such issuance will impair its ability to perform that service. Petitioner and protestant also alleges that such issuance is not reasonably necessary and appropriate for such purpose.

[fol. 101] Wherefore, said petitioner and protestant prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted. Petitioner and protestant further prays that a hearing be held in this matter to determine whether the statutory requirements of Section 20a (2) are met, and further prays that because of the matters alleged and the matters that will be developed at the hearing, when held, that the Commission refuse to grant Railway Express Agency, Incorporated, authority to issue to The Greyhound Corporation the 500,000 shares of authorized but unissued stock and refuse to grant any other or different authority.

Respectfully submitted,

Missouri Pacific Railroad Company, By D. B. Jenks, President.

Dated October 30, 1964

Correspondence with respect to this Petition and Protest should be addressed to:

Mark M. Hennelly
Vice President and General Counsel
Missouri Pacific Railroad Company
2003 Missouri Pacific Building
St. Louis 3, Missouri

[fol. 102] *Duly sworn to by D. B. Jenks, jurat omitted in printing.*

[fol. 103] Certificate of Service (omitted in printing).

[fol. 104]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITION OF THE GREYHOUND CORPORATION FOR LEAVE TO INTERVENE IN SUPPORT OF THE APPLICATION—Filed November 9, 1964

Comes now petitioner The Greyhound Corporation (hereinafter called "Greyhound") and respectfully represents that it has an interest in the above-entitled proceeding and requests that it be granted leave to intervene in support of applicant and to become a party to said proceeding. As grounds for said proposed intervention, petitioner states as follows:

1. Petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware. While petitioner is not a carrier under the Interstate Commerce Act, it has been determined to be subject to certain provisions of that Act. (See Commission Opinion and Order dated October 25, 1963, in Docket No. MC-F-8531.) Peti-

[File endorsement omitted]

tioner owns all of the stock of Greyhound Lines, Inc., a motor carrier of passengers and express subject to the Interstate Commerce Act.

[fol. 105] 2. The application in the above-entitled proceeding seeks authority from this Commission for Railway Express Agency, Incorporated (hereinafter called "R E A") to issue 500,000 shares of its common stock to Greyhound at a price of $20 per share or a total of $10 million. The issuance of such shares to Greyhound would give it a 20% interest in R E A and would enable it to elect 20% of the Board of Directors of R E A.

3. Petitions for leave to intervene in this proceeding have been filed by or on behalf of certain rail carriers, bus carriers, freight forwarders, and truck carriers. All of these petitions seek to create the erroneous impression that this proceeding involves an issue of control of R E A by Greyhound. Greyhound offered to acquire control of R E A but was unsuccessful, as the petitioning rail carriers well know. The railroad stockholders of R E A approved an offer of a 20% interest only and because of the right of first refusal of said railroad stockholders as to all presently outstanding shares of R E A, it is unlikely that Greyhound will acquire any more than said 20% interest in the future. In the event that Greyhound should subsequently acquire any additional stock interest which would even approach a position of control, Greyhound would file an appropriate application under Section 5 of the Interstate Commerce Act.

[fol. 106] Wherefore, this petitioner prays leave to intervene and to be treated as a party hereto with right to have notice of all further proceedings and to participate therein, and further prays that since no issue of control is involved in this proceeding, this Commission grant the application of R E A without hearing.

Dated at San Francisco, California, this 6th day of November, 1964.

Respectfully submitted,

The Greyhound Corporation, By Gerald H. Trautman, Vice President.

Robert J. Bernard, The Greyhound Corporation, 140 South Dearborn Street, Chicago, Illinois 60603;

Gerald H. Trautman, The Greyhound Corporation, 601 California Street, San Francisco, California 94108;

Attorneys for Petitioner, The Greyhound Corporation.

[fol. 107] *Duly sworn to by Gerald H. Trautman, jurat omitted in printing.*

[fol. 108] Certificate of Service (omitted in printing).

[fol. 109] [File endorsement omitted]

[fol. 110]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITION OF THE UNITED STATES DEPARTMENT OF JUSTICE FOR LEAVE TO INTERVENE, FOR CONSOLIDATION OF THIS PROCEEDING WITH A PROCEEDING TO DETERMINE THE LAWFULNESS OF THE PROPOSED TRANSACTION UNDER SECTION 7 OF THE CLAYTON ACT, FOR A FULL EVIDENTIARY HEARING, AND FOR A PRE-HEARING CONFERENCE—Filed November 9, 1964

Comes now petitioner, the United States Department of Justice to state that it has an interest in the subject matter involved in the above-entitled proceeding; that it desires to intervene and be considered in all respects as a party thereto; that it requests that a formal hearing be ordered

at which relevant evidence may be adduced for consideration by the Commission, and that the Commission direct that a pre-hearing conference be held for the purpose of formulating the issues. Petitioner further requests the Commission to institute a proceeding for the purpose of [fol. 111] determining whether Section 7 of the Clayton Act would be violated by Greyhound's acquisition of REA stock under the circumstances and conditions outlined in REA's application. As grounds for such Commission action, petitioner respectfully shows the following:

I

Applicant, REA, seeks authority to issue 500,000 shares of its authorized but unissued common stock to the Greyhound Corporation for $20.00 per share upon the terms and conditions set forth in an agreement entered into by and between REA and Greyhound on October 6, 1964. Among other things, that agreement permits Greyhound to offer to purchase up to 1,000,000 additional shares of the common stock of REA from present shareholders at a price of $20.00 per share, cash. Also the agreement provides for the adoption of a resolution by the REA Board, which resolution was adopted on September 1, 1964, declaring the intention of REA to consider seriously and work toward a long-term agreement between REA and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage. Accordingly, the application states that REA believes that the 500,000 shares it desires to issue to Greyhound will give Greyhound a sufficient equity interest in the Applicant to provide a working basis which will justify both companies in going forward with the study of, and ultimately entering into an agreement with respect to the subject matter mentioned above. Furthermore, the agreement provides, [fol. 112] and the REA Board so resolved on September

1, 1964, that Greyhound shall be permitted to name 20 per cent of the REA Board of Directors.

II

While petitioner recognizes that the proposed transaction and the agreements related thereto raise serious questions of Greyhound control or power to control REA, it does not at this time take the position that the transaction will result in such control. Accordingly, petitioner does not actively urge that a section 5 control proceeding be instituted. This does not mean, however, that petitioner has concluded that the acquisition would not result in Greyhound control of or the power to control REA. Nor does it mean petitioner would be opposed to a section 5 proceeding if the Commission were to deem such a proceeding appropriate and necessary.

But no matter what the Commission may do about instituting a section 5 control proceeding, petitioner asserts that the application places before the Commission serious questions under section 7 of the Clayton Act which by virtue of section 11 thereof the Commission has a duty to enforce. Greyhound will, if the Commission approves this application, acquire a substantial stock interest in REA and establish a working basis with REA to enter into agreements of mutual advantage. Competitors of REA and Greyhound have asserted in papers filed with the Commission that they will be competitively disadvantaged by the proposed transaction. Their protests are tantamount to allegations that the effects of the proposed transaction may be substantially to lessen competition or to tend to create a monopoly. Therefore, the Commission in accordance with [fol. 113] its responsibilities under section 11, cannot avoid determining to what extent, if any, the proposed transaction would result in effects which section 7 of the Clayton Act is intended to prevent.

Since the anticompetitive issues raised by a Clayton Act section 7 proceeding are virtually identical to the competition issues which the Commission must consider in a

section 5 control proceeding when it undertakes to arrive at an "accommodation of section 5(2) and the antitrust legislation" [1] by "estimat[ing] the scope and apprais[ing] the effect of the curtailment of competition which will result" [2], the Commission may be well-advised to consolidate a section 5 proceeding, if one is instituted, with the section 7 proceeding which we believe it is required in any event to commence.

III

Petitioner further requests the Commission to direct that a pre-hearing conference be held for the purpose of formulating the issues in any proceedings which may be commenced as a result of the proposed transaction. In light of the numerous protests and petitions filed in this matter, it will be essential that the issues be defined prior to evidentiary hearings so that all parties may be aware of the issues as to which they should be prepared to address themselves.

[fol. 114]

IV

Accordingly, the United States Department of Justice respectfully prays that the Commission grant this petition for intervention and that the application herein be the subject of consolidated hearings under section 7 of the Clayton Act and sections 20a and 214 of the Interstate Commerce Act, and that this matter be set promptly for prehearing conference.

Dated at Washington, D. C. this 9th day of November, 1964.

Respectfully submitted,

William H. Orrick, Jr., Assistant Attorney General.
Joseph J. Saunders, Attorney, Department of Justice.
A. Paul Victor, Attorney, Department of Justice.

[fol. 115] Certificate of Service (omitted in printing).

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[1] Minneapolis & St. Louis R. Co., 361 U.S. 173, 186 (1959).

[2] McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944).

[fol. 116]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 23324

[Title omitted]

PETITION FOR LEAVE TO INTERVENE AND PROTEST OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND REGULAR COMMON CARRIER CONFERENCE AND REQUEST FOR ORAL HEARING—Filed November 9, 1964

* * * * * * *

[fol. 117] commodity common carriers of freight, and to advance such interests through cooperation and organization. Membership, embracing companies of all sizes, includes carriers operating in all the forty-eight contiguous states and Alaska.

III

The Executive Committee of ATA and the Board of Governors of the Conference, composed of motor carriers competitive with Railway Express Agency, Inc. (REA), and the freight operations of The Greyhound Corporation (Greyhound), have reviewed the matter and respectively directed ATA and the Conference to file this petition and protest.

IV

Petitioners file this pleading pursuant to notice of REA's application published in the Federal Register on October 24, 1964. Petitioners do not seek to broaden the issues, and we submit that they will not be broadened if we are permitted to intervene. The issues we raise are basic to the proper determination of REA's application herein and must be resolved in any event by the Commission in disposing of this proceeding. Accordingly, we ask that our

petition for leave to intervene be granted, and that due consideration be given to our protest to the application and our request for oral hearing.

V

REA has filed an application under sections 20a and 214 of the Interstate Commerce Act for authority to issue 500,000 shares of its authorized but unissued stock. The reason for the application is that REA's stockholders have approved the sale of a 20 percent stock interest in REA [fol. 118] to Greyhound,[1] and the proposed stock issuance represents that interest. The issuance of the 500,000 shares, along with the presently outstanding 1,999,188 shares, now owned by 60 railroads, will bring REA's total outstanding shares of stock to 2,499,188. Further, under and as part of the agreement between Greyhound and REA, Greyhound has made an offer to purchase up to 1,000,000 additional shares of REA's common stock from REA's railroad stockholders.

VI

Despite REA's vigorous assertions to the contrary, the transaction proposed by the application filed in this docket is an attempt to effect control of REA by Greyhound without going through a section 5 proceeding. As a condition precedent to REA's agreement to sell Greyhound 20 percent of its unissued stock, Greyhound had to offer to buy an additional 1,000,000 shares of REA's stock from the owning railroads (Exhibit 4, pp. 2-3). If Greyhound acquires the involved 500,000 shares and buys 1,000,000 more from the railroad stockholders, Greyhound will then own

[1] Pursuant to a resolution adopted by REA's stockholders at a special meeting on September 17, 1962, approval of at least two-thirds of the corporation's common stockholders was required to sell the 500,000 shares of stock to Greyhound. The vote was 1,654,572 shares in favor of the sale and 269,880 shares opposed (REA's Exhibit 6, pp. 2-3).

60 percent of REA's stock and will clearly control the company without Commission approval.[2]

And even if Greyhound should fail, after buying the 500,000 shares, to acquire the 1,000,000 shares of stock presently held by the railroads, it may still control REA. The Commission has held, in a long series of cases, that the holding of a minority interest in a company does not necessarily mean that control or operation in a common interest has not been effectuated. We request, therefore, that oral hearing be held so that all the circumstances and details regarding the proposed transaction under consideration may be established.

[fol. 119] VII

Petitioners allege further that the instant transaction is not for a lawful object within REA's corporate purposes, is not compatible with the public interest, and is not necessary or appropriate for, or consistent with, the proper performance by REA of service to the public as a common carrier, and that it will impair its ability to perform such service.

Prayer

For the reasons stated, ATA and the Conference respectfully request (1) that they be permitted to intervene and be treated as protestants hereto, (2) that oral hearing be held to determine whether the statutory requirements of sections 20a and 214 are met and to explore the question of control of REA by Greyhound, implicit in the application, and (3) that, pending such hearing, the Commission

[2] Actually, Greyhound need only acquire 749,595 shares of the outstanding stock in addition to the 500,000 shares here involved to hold a majority of the shares.

withhold granting the authority sought by REA in this proceeding.

Respectfully submitted,

American Trucking Associations, Inc., Peter T. Beardsley, Richard R. Sigmon, William R. Rubbert, Harry J. Jordan, Paul D. Borghesani, 1616 P Street, N. W., Washington, D. C. 20036.

Regular Common Carrier Conference, R. Edwin Brady, 1616 P Street, N. W., Washington, D. C. 20036; Roland Rice, Rice, Carpenter and Carraway, 618 Perpetual Building, Washington 4, D. C.

Certificate of Service (omitted in printing).

[fol. 120]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

RETURN TO INFORMATION REQUEST TO REA—Filed November 17, 1964

[fol. 121]

1. *With reference to the price of $20 per share*:

a. *How was this price arrived at?*

In January 1964, representatives of Greyhound approached REA with a proposal for Greyhound to acquire a controlling interest in REA. As set forth in a letter dated January 31, 1964, from Greyhound to REA, Greyhound proposed, among other things, to purchase from REA stockholders 51% to 100% of the outstanding stock of REA at a price of $25 per share, Greyhound agreeing

[File endorsement omitted]

also to purchase from tendering REA stockholders their REA notes. The REA Board considered said proposal at its meeting on February 4, 1964 (see Annex A(1)), and requested Greyhound to submit a formal offer along the lines suggested.

In response to such request of the REA Board, Greyhound submitted a formal offer dated February 21, 1964, to purchase the REA stock, along with proposals for amendment of the Standard Express Operations Agreement. The REA Board passed such offer and proposals on to the REA stockholders without taking a position thereon (see Annex A(2)). From discussions had with various REA stockholders, it became abundantly clear that Greyhound's proposal would not be successful since there was little [fol. 122] likelihood, in view of the right of first refusal held by each of the stockholders, that Greyhound would be permitted to acquire any position in REA from REA stockholders.

In view thereof, and after a number of informal discussions, consideration was given to the possibility of Greyhound's acquisition of 500,000 shares of authorized but unissued REA stock, these shares not being subject to the right of first refusal. It was understood that, subsequent to such acquisition, Greyhound would make an offer to REA stockholders to purchase certain of their shares, Greyhound being fully aware that there was little likelihood, in view of the right of first refusal, that it would acquire any shares from REA stockholders. From REA's standpoint, the purpose of having Greyhound make an offer to the railroad stockholders was to satisfy the desire of certain of the REA stockholders that an offer be made which would trigger the right of first refusal and thereby assure such stockholders of a market for such shares. More importantly, the acquisition of 500,000 shares of authorized but unissued stock from REA would benefit REA by supplying capital which was sorely needed by REA to meet its anticipated capital expenditures.

At a meeting of the REA Board on July 7, 1964 (see [fol. 123] Annex A(3)), the President of REA submitted an outline of a new proposal by Greyhound to purchase from REA 500,000 authorized but unissued shares at a price of $16 per share and, after consummation of the purchase of the 500,000 shares, to offer to purchase additional shares from REA stockholders, at a price expected to be $25 per share. The REA Board approved in principle the Greyhound offer and requested Greyhound to submit a formal proposal along such lines.

Upon receipt of such formal proposal dated July 16, 1964 (see Annex A(4)), the REA Board at its meeting on July 28, 1964 (see Annex A(5)), unanimously directed the President of REA to appoint a Committee to negotiate a single price of $20 per share for both the stock to be purchased from REA and the stock to be purchased from REA stockholders. The reason why the Board unanimously requested negotiations at a single price of $20 a share (rather than at a price of $16 a share for the stock to be acquired from REA and $25 a share for the stock to be acquired from REA stockholders) was that certain of the REA stockholders expressed an intention to prevent Greyhound from acquiring any shares in addition to the 500,000 shares to be acquired from REA and insisted that it was unfair to require them to pay $25 a share on the exercise of their right of first refusal when Greyhound [fol. 124] was purchasing shares from REA at about the same time at $16 a share.

The appointed Committee and the President met with representatives of Greyhound and Greyhound indicated it would consider a formal offer by REA incorporating such change if such offer were first approved by REA stockholders. At a meeting of the REA Board on September 1, 1964 (see Annex A(6)), the REA Board, by a vote of 14 to 3, authorized the execution of such a formal offer from REA to Greyhound and such offer was approved by a favorable vote of over 80% of REA stockholders at their meeting on October 1, 1964, and accepted, subject to Inter-

state Commerce Commission approval, by Greyhound on October 6, 1964.

REA is of the firm belief that the price of $20 per share is fair and reasonable. Among the factors considered in reaching such conclusion are the following:

(1) REA's current earnings are about $1.00 and a price of 20 times earnings appears favorable to REA. The stock of railroads with AA and A bond ratings was selling recently at 12 to 13 times earnings, based on June 30, 1964, earnings, and the 1963 Moody's 25 railroads stock average was at a ratio of 12.5 times earnings.

(2) REA's book value per share is only $9, even [fol. 125] if the tax reserves are fully included.

(3) In 1963 the Boston & Maine Railroad petitioned and received authority to substitute its shares of REA stock in lieu of collateral held as security for a government-guaranteed loan and the value placed on the REA stock at that time by the Commission was less than $20 per share.

(4) Lehman Brothers recently offered to underwrite a public sale of 400,000 new shares at a net return of $16 per share to REA—if various conditions were met, including REA's maintaining earnings about 50% higher than REA is actually achieving.

b. *Furnish copies of the computations and working papers.*

See answer to item 1a and annexes referred to therein. There are no other computations or working papers.

2. *With reference to the special meeting of stockholders of REA held on October 1, 1964:*

a. *Furnish the identity of each stockholder who voted against the proposed resolutions.*

[fol. 126] Atchison, Topeka and Santa Fe Railway Company
Denver & Rio Grande Western Railroad Company
Missouri Pacific Railroad Company
St. Louis Southwestern Railway Company
St. Louis Southwestern Railway Company of Texas
Southern Pacific Company
Texas and Pacific Railway Company

b. *Furnish the identity of each stockholder who was neither present nor represented by proxy at the meeting.*

Burlington & Rock Island Railroad Company
Chicago, Burlington & Quincy Railroad Company
Colorado & Southern Railway Company
Kansas City Southern Railway Company
Western Pacific Railroad Company

c. *Furnish a copy of the proxy material submitted to stockholders prior to the meeting.*

Attached hereto as Annex B are copies of the following:

(1) Notice of Meeting dated September 1, 1964;

(2) Proxy Statement dated September 1, 1964; and

(3) Proxy for Special Meeting of Stockholders, in the form mailed by REA to each stockholder prior to the meeting.

3. *For the past 10 years, for each item submitted to vote to the stockholders, furnish the following:*

a. *The total outstanding voting power at the time.*

b. *The total number of shares voted.*

[fol. 127]

c. *The total number of shares which were not voted.*

d. *What percent of the stock was needed to approve the items voted on?*

Attached hereto as Annex C is a chart furnishing in tabular form the information requested.

4. *For each board of directors meeting during the past 5 years, indicate:*

a. *The number of directors present.*

b. *The number of directors absent.*

c. *The number of vacancies.*

d. *The number of directors constituting a quorum.*

e. *The number of affirmative votes necessary to carry a resolution.*

Attached hereto as Annex D is a chart indicating in tabular form the information requested.

5. *Are there any existing interlocking directors between Greyhound, its affiliates and subsidiaries, on the one hand, and REA, its affiliates and subsidiaries and the owning railroads, their subsidiaries and affiliates, on the other hand? If so, please identify.*

REA has no knowledge of any such interlocking directors and Greyhound has informed REA that there are no such interlocking directors. (A copy of the letter dated October 27, 1964, from REA to Greyhound and a copy of the reply dated October 31, 1964, are annexed hereto as Annex E.)

6. *Is it contemplated or anticipated that Greyhound will dispose of any of the REA stock to any of its, Greyhound's, affiliates or subsidiaries?*

REA does not, and Greyhound has informed REA that [fol. 128] Greyhound does not, contemplate or anticipate that Greyhound will dispose of any of the REA stock to any of Greyhound's affiliates or subsidiaries. See Annex E.

7. *Are there any commitments by any of present REA stockholders to sell their holdings to Greyhound? If so, give details.*

REA has no knowledge of any such commitments and Greyhound has informed REA that there are no such commitments. See Annex E.

8. *After giving effect to the proposed transaction and the election of the so-called "Greyhound Directors", identify, by name and business affiliation, each of the 25 directors.*

The information requested is set forth in Annex F.

9. *Have there been any discussions, considerations or commitments, whatsoever, relative to placing any of the five so-called "Greyhound Directors" on the Executive Committee? If so, furnish details.*

REA has no executive committee and has given no consideration to creating an executive committee or placing thereon any of the so-called "Greyhound Directors".

10. *Furnish such additional details as are available as to precisely what is contemplated in the consolidation of the operating functions and facilities of REA and Greyhound.*

Attached hereto as Annex G is a memorandum dated June 18, 1964, entitled "Memorandum of Understanding Reached by R. F. Shaffer, Executive Vice President, Greyhound Lines, Inc. and Truman T. Moore, Vice President, [fol. 129] Operations, REA Express of Potential Benefits by Consolidation or Merger of Certain Activities of the Two Companies".

The memorandum does not purport to be a complete study or plan of consolidation of operating functions and facilities of REA and Greyhound, and was meant to be only an itemization of possible economies and an estimate of their magnitude. The memorandum is the product of only a 2½-day discussion in which Messrs. Moore and Shaffer were directed to include in their study any and all economies which, as operating men, they would consider desirable without giving any consideration to any other factors which might make such economies unattainable or impossible to achieve. This study was made at a time when the Greyhound proposal under consideration contemplated Greyhound's acquiring in excess of 50% of the outstanding shares of REA stock. Extensive studies and investigations (which have not been undertaken) would be required before REA and Greyhound could proceed with any economies in operating functions or facilities.

11. *Furnish such additional details as are available relative to the contemplated sale of REA stock to airlines and/or the general public. (See paragraph (d), page 1, Exhibit 5).*

    a. *How many shares?*

    b. *Will it be presently authorized and outstanding shares?*

[fol. 130]

    c. *If it will be "new" shares, unauthorized at the present time, how will the Greyhound's right to elect 20 percent of the board of directors be affected?*

REA has taken no steps towards, and has reached no conclusions concerning, a sale of REA stock to airlines and/or the general public other than the adoption by the REA Board of Directors of the resolution referred to on page 10 of the minutes attached hereto as Annex A(6).

As to subparagraph c of the question, regardless of whether and how REA might sell stock in the future, Greyhound's right to name five directors is expressly made subject (in Article II of the REA By-laws, as amended), to Greyhound's holding at least 20% of the REA stock issued and outstanding at the time.

12. *Assuming that Greyhound purchases a portion, or all, of the additional 1,000,000 shares, will Greyhound's representation on the board of directors be increased proportionately?*

REA has made no commitment, and has no plans, to increase Greyhound's representation on the REA Board of Directors in the unlikely event that Greyhound could purchase a portion, or all, of the additional 1,000,000 shares which may be tendered to Greyhound. The By-laws of REA, as amended, do not provide for any such proportionate representation and such By-laws provisions may be amended only by the vote of two-thirds of REA's stock issued and outstanding.

[fol. 131]

13. *Should the Eastern District Railroads own less than 1,085,748 shares, would they still have the right to nominate seven REA directors?*

Yes, under the REA By-laws, which may be amended in this respect only by a vote of two-thirds of REA's issued and outstanding stock.

14. *Should the Western District Railroads own less than 633,180 shares, would they still have the right to nominate six REA directors?*

Yes, under the REA By-laws, which may be amended in this respect only by a vote of two-thirds of REA's issued and outstanding stock.

15. *Should the Southern District Railroads own less than 280,260 shares, would they still have the right to nominate five REA directors?*

Yes, under the REA By-laws, which may be amended in this respect only by a vote of two-thirds of REA's issued and outstanding stock.

16. *Does nomination of a director by a railroad district guarantee election of that person to the REA Board of Directors?*

Article Ninth of REA's charter provides that directors *shall* be nominated as provided in the By-laws. The By-laws in turn provide a specific method for the nomination of directors. Section 2 of Article II of the By-laws, as amended, provides that the Board of Directors shall be elected by ballot at each annual meeting of stockholders and further provides that there may be seven Directors-at-[fol. 132] large and the remainder *shall be the persons nominated by districts.* The charter and By-laws by their terms thus undertake to guarantee election to directors nominated by a railroad district and such has been the fact throughout the corporate existence of REA.

Respectfully submitted,

WILLIAM J. TAYLOR
ALAN F. DONIGER
JOEL H. GROSS

/s/ HENRY P. RIORDAN
Counsel for Applicant
Railway Express Agency,
Incorporated

Dated: November 16, 1964.

[fol. 133] Certificate of Service (omitted in printing).

[fol. 134]

ANNEXES TO RETURN TO INFORMATION REQUEST TO REA

Attached are the following Annexes to the Return to Information Request to REA dated November 16, 1964:

Annex No.	*Document*
A(1)	Excerpt from minutes of meeting of REA Board on February 4, 1964
A(2)	Excerpt from minutes of meeting of REA Board on March 3, 1964
A(3)	Excerpt from minutes of meeting of REA Board on July 7, 1964
A(4)	Letter dated July 16, 1964, from The Greyhound Corporation to REA
A(5)	Excerpt from minutes of meeting of REA Board on July 28, 1964
A(6)	Excerpt from minutes of meeting of REA Board on September 1, 1964
B	Notice of Special Meeting of Stockholders, Proxy Statement and Proxy for Special Meeting of Stockholders held on October 1, 1964
C	Information requested in question 3 with respect to each item submitted to the vote of REA stockholders for the past 10 years
D	Information requested in question 4 with respect to each REA Board of Directors meeting during the past 5 years
E	Letter dated October 27, 1964, from REA to The Greyhound Corporation and reply dated October 31, 1964

[fol. 135]

F	Composition of REA Board after giving effect to the election of the so-called "Greyhound Directors"

Annex No.	*Document*
G	Memorandum of understanding reached by R. F. Shaffer, Executive Vice President, Greyhound Lines, Inc. and Truman T. Moore, Vice President, Operations, R E A Express of potential benefits by consolidation or merger of certain activities of the two companies

[fol. 136]

Annex A(1)

BOARD OF DIRECTORS, February 4, 1964

PROPOSAL BY THE GREYHOUND CORPORATION TO ACQUIRE CAPITAL STOCK OF THE COMPANY

The President referred to material distributed to the Directors with his letter of January 21, 1964 regarding a tentative proposal by the Greyhound Corporation for acquisition of capital stock of the Company. He said that a slightly modified proposal, dated January 31, 1964, had just been received from Greyhound, such proposal reading as follows:

"THE GREYHOUND CORPORATION
140 South Dearborn St.
Chicago 3, Ill.

January 31, 1964

"Mr. William B. Johnson
President
Railway Express Agency
219 East 47th Street
New York 17, New York

"Dear Mr. Johnson:

"We have been discussing with you and a Committee of your Directors the possibility of The Greyhound

Corporation (herein called 'Greyhound') acquiring a controlling interest in Railway Express Agency, Incorporated, (herein called 'REA'). It appears from these conversations that there may be an interest on the part of many of the shareholders of REA in disposing of their stock. Accordingly, Greyhound is presenting to you herein an outline of a tentative proposal for consideration by you and your Directors at their meeting on February 4, 1964. This tentative proposal has not been presented to The Greyhound Corporation's Board of Directors, but its Executive Committee has authorized the exploration of this matter with you along the lines hereinafter set forth.

"The tentative proposal is as follows:

"1. Greyhound would pay the REA shareholders $25 per share for each share of REA stock held by them. You will recognize that this is somewhat above the valuation figure used by the Interstate Commerce Commission.

"2. Greyhound would acquire at least 51% of the outstanding REA stock.

[fol. 137] "3. At least an additional 16% of the presently outstanding REA stock would be tendered to Greyhound which in turn intends to make said stock available for purchase by the major airlines in the United States. This means that the railroads must tender to Greyhound at least 67% of the outstanding REA stock.

"4. The provision in the operating agreement, effective October 1, 1959, giving REA shareholders a right of first refusal to purchase any REA shares tendered for sale would have to be modified or all of the present REA shareholders would have to waive their rights under that provision. The provision is found in Section 3 of Article 16 of the operating agreement.

"5. If an REA shareholder tendered its stock to Greyhound at the price of $25 per share, Greyhound would purchase its REA notes at their face value, giving the REA shareholder therefor cash and new income debentures in the ratio of $17 cash to $10 in income debentures. In other words, if all of the stock should be tendered to Greyhound, Greyhound would purchase the $27 million in REA notes now outstanding by paying $17 million in cash and giving $10 million of income debentures.

"6. The new income debentures would entitle the debenture holders to their proportionate shares of 20% of the pretax earnings of REA after all payments to the railroads under the operating agreement, limited to an annual return of not more than 12% on the face amount of the debentures. In other words, if 75% of the outstanding stock were sold to Greyhound, 75% of the existing notes would be refunded and the new income debentures issued in exchange therefor would be entitled to 75% of 20% of the pretax earnings, or 15% of pretax earnings, subject to the limitations mentioned above.

"7. The new income debentures would have a 40-year maturity, would be callable at par after ten years and would, of course, have no fixed coupon rate or sinking funds.

"8. If possible, the existing notes of the shareholders who do not sell their stock to Greyhound would be reissued in similar form but with more workable and flexible provisions and with some correlation to the new income debentures proposed above.

"9. The bylaws of REA would have to be amended to change the method of election of Directors so that Greyhound and the airlines could have their proportionate number of Directors.

"10. The operating agreement btween REA and the railroads would have to be amended in the following respects:

"(a) Article 10, Section 3(a), would have to be amended to eliminate the control of the rail Directors over the formula referred to therein. This could be [fol. 138] accomplished by eliminating the second sentence of that Section.

"(b) Some modification in Article 16, Section 2, relative to the right of withdrawal on the part of the rail carriers would be necessary. Greyhound is to pay a substantial amount of money for its interest in REA. It would, therefore, want some assurance that the rail carriers were going to continue to provide essential service. Greyhound buses would be able to perform only a relatively small portion of the underlying transportation.

"(c) As already mentioned, the right of first refusal set forth in Article 16, Section 3, would have to be eliminated or the waiver of all existing stockholdholders would have to be obtained.

"Consideration should be given at some time in the future to the substitution of a regular tariff arrangement for the existing operating agreement, but this is not a condition of the proposed acquisition.

"11. The final transaction would be subject to the approval of the Interstate Commerce Commission.

"If Greyhound should be successful in acquiring the requisite stock upon substantially the foregoing basis, it would be prepared to retain the present management and to carry on the REA operations substantially as they are now being carried on. Greyhound would also be prepared to finance its pro rata share of the capital requirements of REA.

"If your Board of Directors is interested in the foregoing, we are prepared to sit down with your repre-

sentatives and attempt to work out a formal agreement for approval by the Board of Directors of REA and Greyhound and the submission to railroad shareholders.

Yours very truly,

THE GREYHOUND CORPORATION

By /s/ D. P. Boothe, Jr.
D. P. Boothe, Jr."

He pointed out that the said proposal is conditioned upon unspecified amendments to certain sections of the Standard Express Operations Agreement as well as the tender to Greyhound of a minimum of 67% of the capital stock of the Company.

[fol. 139] Mr. D. P. Boothe, Jr., a Director of The Greyhound Corporation entered the meeting and spoke briefly on the tentative proposal. After discussion of some of the features of such proposal, Mr. Boothe left the meeting.

After discussion, on motion duly made by Mr. Miller, seconded by Mr. McInnes and carried, it was voted to request The Greyhound Corporation (1) to submit a specific proposal for amendments to the Standard Express Operations Agreement pursuant to Article 16, Section 1(c) thereof; and (2) to submit a formal offer for purchase of capital stock upon terms and conditions no less favorable to present stockholders than those outlined in the tentative proposal quoted above—both the amendments and the offer to be received within two weeks if possible, and to be considered at the March meeting of the Board, for referral to the railroad signatories to the Standard Agreement and to the stockholders.

STAMP—APPROVED BY BOARD OF DIRECTORS
RAILWAY EXPRESS AGENCY, INCORPORATED

Feb. 4, 1964
Date

Annex A(2)

/s/ R. J. Fletcher, Secretary

[fol. 140] BOARD OF DIRECTORS, March 3, 1964

PROPOSAL BY THE GREYHOUND CORPORATION TO ACQUIRE CAPITAL STOCK OF THE COMPANY

The President referred to the action of this Board at its meeting February 4, 1964 when it voted to request The Greyhound Corporation (1) to submit a specific proposal for amendments to the Standard Express Operations Agreement; and (2) to submit a formal offer for purchase of capital stock upon terms and conditions no less favorable to present stockholders than those outlined in the tentative proposal presented to the meeting—both the amendments and the offer to be considered at the March meeting of the Board, for referral to the railroad signatories to the Standard Agreement and to the stockholders. He said that in response to this request, Greyhound forwarded on February 21 three documents—a letter dealing with contract amendments, a transmittal letter and a letter addressed to REA stockholders—all of which were sent to the Directors on the same day. He said that the matter was now before the Board for consideration.

After discussion, on motion, duly made, seconded and carried, it was—

RESOLVED, That the President be and he hereby is directed to send to the stockholders of the Company:

1. Letter to the shareholders from the Greyhound Corporation relating to its offer to purchase stock of REA;
2. Transmittal letter from Greyhound; and
3. Letter from Greyhound setting forth proposed amendments to the Standard Express Operations Agreement;

all being dated February 21, 1964, together with a transmittal letter indicating that the referral to the

stockholders is by direction of the Board and that the Board has taken no position on the Greyhound proposal.

[fol. 141] Annex A(2)

THE GREYHOUND CORPORATION

140 South Dearborn Street, Chicago 3, Illinois

February 21, 1964

Shareholders of
Railway Express Agency, Incorporated
c/o Mr. William B. Johnson, President
Railway Express Agency, Incorporated
219 East 42nd Street
New York 17, New York

Dear REA Shareholder:

Representatives of The Greyhound Corporation (herein called "Greyhound") have discussed with representatives of Railway Express Agency, Incorporated, (herein called "REA") the possibility of Greyhound's acquiring a controlling stock interest in REA. It appears from these discussions that there is an interest on the part of many of the REA shareholders in disposing of their stock. Accordingly, Greyhound herein offers to purchase your stock upon the following basis:

1. Greyhound will pay to you $25 per share for each share of REA stock held by you.

2. If you tender your stock to Greyhound at the price of $25 per share, Greyhound will acquire or cause REA to acquire or refund your REA notes dated October 1, 1959, at their face value, giving you therefor cash and new REA income debentures in the ratio of $17.637 cash to $10 in REA income debentures or at your option entirely in cash.

3. The new REA income debentures would bear non-cumulative interest at the rate of 12% per annum payable solely out of 20% of the pretax earnings of REA after all payments to the railroads under the operating agreement dated October 1, 1959, such percentage to be reduced proportionately to the extent noteholders elect to take cash rather than debentures. The debentures would have a 40-year maturity, would be callable at par after 1973, and would, of course, have no fixed coupon rate.

[fol. 142] The following are conditions of the foregoing offer:

1. Greyhound must acquire at least 67% of the outstanding REA stock, or such lesser percentage as Greyhound in its sole discretion may elect to accept.

2. A formal agreement of sale providing details of the sale within the framework of the foregoing offer must be worked out with REA shareholder representatives and approved by the Executive Committee or the Board of Directors of Greyhound.

3. The Greyhound accountants must confirm that the REA audited balance sheet of June 30, 1963, which REA furnished to us, substantially represents the financial condition of REA subject to the results of normal business operations of REA since that date.

4. The final transaction must be approved by the Interstate Commerce Commission.

5. The operating agreement between REA and the railroads dated October 1, 1959, must be amended as provided in the Greyhound letter of February 21, 1964, to Mr. William B. Johnson.

If you are prepared to recommend the acceptance to your Board of Directors of the foregoing offer subject to the foregoing conditions, will you so indicate at the bottom of this letter. As soon as stockholders owning at least 67%

(or such lesser percentage as we may elect) of the REA stock have indicated their tentative acceptance we shall proceed to endeavor to work out a mutually satisfactory [fol. 143] formal agreement of sale for consideration by you and your Board of Directors and the Executive Committee or the Board of Directors of Greyhound.

Yours very truly,

THE GREYHOUND CORPORATION

By /s/ GERALD H. TRAUTMAN
Its Vice-President

....., 1964

The undersigned shareholder of Railway Express Agency, Incorporated, is prepared to recommend the acceptance of the foregoing offer subject to the foregoing conditions.

..... RAILROAD COMPANY

By .....

Its .....

[fol. 144] Annex A(2)

THE GREYHOUND CORPORATION
140 South Dearborn Street, Chicago 3, Illinois

February 21, 1964

Mr. William B. Johnson
President
Railway Express Agency, Incorporated
219 East 42nd Street
New York, New York 10017

Dear Mr. Johnson:

This is in response to the first item covered by the resolution of the Railway Express Agency Board of Directors; namely, the request for submission of a specific proposal for amendments to the Standard Express Operations

Agreement pursuant to Article 16, Section 1 (c), thereof. It is proposed that the Standard Express Operations Agreement made as of October 1, 1959, as heretofore amended, be further amended in the following respects:

(1) Subparagraph (a) of Section 3 of Article 10 shall be amended to read in its entirety as follows:

"A car-foot mile rate for each group shall be established on the basis of the average express service out-of-pocket costs of the rail companies party to this form of agreement in such group. Such out-of-pocket cost for each group shall be determined by the use of a uniform formula prescribed by the Board of Directors of the Express Company, upon the recommendation of an Accounting Committee created by the Board in accordance with Section 1 of Article 15, *provided, however,* that, if the Rail Company dissents from the formula, the question shall be submitted to arbitration as provided in Section 4 of Article 15."

(2) Section 2 of Article 16 is hereby amended to read in its entirety as follows:

"SECTION 2. The Rail Company may withdraw entirely, but not in part, from this Agreement at any time after July 1, 1967, provided that it has first given at least twelve (12) months' advance written notice to [fol. 145] the Express Company. When any such twelve (12) months' notice of withdrawal is given by any other Rail Company party to this form of agreement, the Rail Company may withdraw on the same date as such other Rail Company, provided that it gives the Express Company written notice of intention to do so at least eight (8) months prior to such date. The Express Company shall forthwith advise all Rail Companies party to this form of agreement of any notice of withdrawal received under this Section."

(3) Section 3 of Article 16 shall be amended by adding the following paragraph as the last paragraph of said Section 3:

"Anything in this Agreement to the contrary notwithstanding, the foregoing provisions of this Section 3 shall not apply to a sale or other disposition of shares of stock (including Stamped Stock) of the Express Company pursuant to an agreement entered into prior to December 31, 1964, between Rail Company and The Greyhound Corporation, *provided, however,* that such sale or other disposition shall be made pursuant to an offer made to all holders of stock of the Express Company, which offer shall provide:

(a) Greyhound will pay to the Express Company shareholders $25 per share for each share of REA stock.

(b) If an REA shareholder tenders its stock to Greyhound at the price of $25 per share, Greyhound will acquire its REA notes dated October 1, 1959, at their face value, giving shareholder therefor cash and new REA income debentures in the ratio of $17.637 cash to $10 in REA income debentures or at shareholders option entirely in cash.

(c) The new REA income debentures would bear noncumulative interest at the rate of 12% per annum payable solely out of 20% of the pretax earnings of REA after all payments to the railroads under the operating agreement dated October 1, 1959, such percentage to be reduced proportionately to the extent noteholders elect to take cash rather than debentures. The debentures would have a 40-year maturity, would [fol. 146] be callable at par after 1973, and would, of course, have no fixed coupon rate.

The following are conditions of the foregoing offer:

(a) Greyhound must acquire at least 67% of the outstanding REA stock or such lesser percentage as Greyhound in its sole discretion may elect to accept.

(b) A formal agreement of sale providing details of the sale within the framework of the foregoing offer must be worked out with REA shareholder representatives and approved by the Executive Committee or the Board of Directors of Greyhound.

(c) The Greyhound accountants must confirm that the REA audited balance sheet of June 30, 1963, which REA furnished to us, substantially represents the financial condition of REA subject to the results of normal business operations of REA since that date.

(d) The final transaction must be approved by the Interstate Commerce Commission.

(e) The operating agreement between REA and the railroads dated October 1, 1959, must be amended as provided in the Greyhound letter of February 21, 1964, to Mr. William B. Johnson.

The amendments set forth in paragraphs 1 and 2 above shall not become effective other than as provided in Article 16, Section 1 (c) of the Standard Express Operations Agreement and unless The Greyhound Corporation accepts, pursuant to the offer described in paragraph 3 above, tenders of more than 50% of the issued and outstanding Common Stock of the Express Company.

Very sincerely yours,

/s/ GERALD H. TRAUTMAN
VP and General Counsel

[fol. 147] Annex A(2)

THE GREYHOUND CORPORATION

140 South Dearborn Street

Chicago 3, Illinois

OFFICE OF THE GENERAL COUNSEL
601 California Street
San Francisco, California 94108 February 21, 1964

AIR MAIL

Mr. William B. Johnson, President
Railway Express Agency, Incorporated
219 East 42nd Street
New York 17, New York

Dear Mr. Johnson:

Attached hereto please find 5 copies of a form of offer by The Greyhound Corporation to acquire the REA stock. You are authorized to transmit this offer to your shareholders if you and your Board decide to do so.

Greyhound is also prepared to work with you and your Directors to bring about an acquisition by Greyhound on either of two other bases:

1. An exchange of REA stock for Greyhound common stock with some arrangement such as a voting trust which would prevent the railroads from voting the Greyhound stock so long as the stock is held by the railroads.

2. The acquisition of assets of REA by Greyhound for cash or common stock, such common stock to be without voting rights as above indicated.

Very sincerely yours,

/s/ GERALD H. TRAUTMAN

Enclosures

[fol. 148] Annex A(3)

BOARD OF DIRECTORS, July 7, 1964

GREYHOUND PROPOSAL FOR PARTICIPATION IN OWNERSHIP OF THE EXPRESS COMPANY

At the request of certain members of the Board the President referred to the outstanding offer of Greyhound Corporation to purchase stock of the express company.

The President distributed to the members of the Board a proposed program of Greyhound participation in ownership of the express company which reads as follows:

A. Greyhound will offer to purchase from Railway Express Agency, Inc., 500,000 shares of authorized but unissued R E A stock at $16 per share, cash. The only conditions attached to this offer will be:

1. Greyhound shall have the privilege of naming 20% of the R E A Board of Directors.

2. The R E A Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,637,054 of outstanding 5% notes, issued originally to R E A's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.

3. The R E A Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between R E A and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage.

4. The R E A Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some R E A stock to airlines and/or the general public if and when conditions appear favorable to the best interests of R E A as a company.

[fol. 149] B. If and when Greyhound acquires the above mentioned 500,000 shares, it will forthwith offer to purchase from such present stockholders as desire to sell their stock a maximum of 749,594 shares (1,999,188 + 500,000 = 2,499,188 ÷ 2 = 1,249,594 — 500,000 = 749,594). In the event that present holders desire to sell more than 749,594 shares in the aggregate, Greyhound will decide to whom the offers shall be made. Offers will definitely be made to all railroad shareholders not presently transporting LCL express.

The President reported that he was advised by Greyhound that it was their intent that Section B of the aforementioned proposed program of Greyhound participation in ownership of the express company contemplated an offering price of $25 per share to present stockholders. The President pointed out, however, that Section B was actually a matter involving the stockholders individually and Greyhound and therefore not within the province of the Board to act upon.

The President further advised that Greyhound desires to secure a side agreement with at least one railroad which will agree not to withdraw from the Standard Express Operations Agreement before the end of 1966 and that, upon request from Greyhound, said railroad will exercise its right to demand arbitration of any change in the out-of-pocket cost formula mentioned in Article 10, Section 3 of the Standard Express Operations Agreement so that Greyhound may contest any such change which it deems unfair to R E A as a company.

After discussion of the proposed program, upon motion, duly made, second and carried, the following resolution was adopted, Messrs. Peoples and Caiazza voting no:

[fol. 150] RESOLVED, that this Board approve in principle the outline of the proposed program submitted to this meeting pursuant to which The Greyhound Corporation would acquire an interest in this corporation, and subject to the submission of a formal proposal by the Greyhound Corporation in substantial conformance with the outline of the proposed program submitted to this meeting, this Board of Directors will favorably recommend such proposal to the managements of its Railroad stockholders for consideration.

The Board then discussed whether to call a Special Meeting of the stockholders to consider the proposed program, after which, on motion, duly made, seconded and carried, the following resolution was adopted:

RESOLVED, that the actions of this Board taken this date be transmitted to the Greyhound Corporation and that after the formal proposal is received from Greyhound Corporation it be sent to all Board members, after which the President shall call a Special Meeting of the Board to consider the method and procedure for submitting Greyhound's formal proposal to the company's stockholders.

[fol. 151] Annex A(4)

THE GREYHOUND CORPORATION

140 Dearborn Street

Chicago 3, Illinois

OFFICE OF THE GENERAL COUNSEL
601 California Street
San Francisco, California

July 16, 1964

Mr. Lawrence Berman
Corporate Secretary
R E A Express
219 East 42nd Street
New York, N. Y.

Dear Mr. Berman:

This will acknowledge your letter of July 8, 1964 advising me of the action of the R E A Board of Directors at its meeting held in New York City on July 7, 1964. The resolution of the R E A Board together with the proposed program referred to therein has been considered by representatives of The Greyhound Corporation and its wholly owned operating subsidiary, Greyhound Lines, Inc. (herein jointly called "Greyhound") and I am authorized to make the offer hereinafter set forth for consideration by the R E A Board and for submission to the R E A stockholders.

Before setting forth the terms of the offer, may I say that Greyhound's interest in R E A at the time when negotiations were commenced several months ago and at the present time stems primarily from our views as to the improvements in service to the public, improvements in the revenues of each of our companies and economies in the operations of each of our companies which could be realized through combination and correlation of certain of

our facilities and services. The studies which we have made separately and jointly with your representatives confirm that there are tremendous possibilities in these respects. We feel, however, that in order to give Greyhound an incentive to pursue these possibilities it should have at least a 20% equity interest in R E A; otherwise Greyhound is somewhat in the position of devoting its time and efforts to the improvement of someone else's property.

[fol. 152] In order to implement the foregoing, Greyhound offers to purchase from R E A 500,000 shares of authorized but unissued R E A stock at the price of $16 per share upon the following terms and conditions:

1. Greyhound will pay cash for said stock upon receipt of the certificate evidencing such shares.

2. The R E A By-Laws will be amended so that Greyhound can name 20% of the R E A Board of Directors.

3. The R E A Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,637,054 of outstanding 5% notes, issued originally to R E A's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.

4. The R E A Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between R E A and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies to be shared by R E A and Greyhound and to improve R E A and Greyhound services and increase public receptivity and patronage of these services.

5. The R E A Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some R E A stock to airlines and/or the gen-

eral public if and when conditions appear favorable to the best interests of R E A as a company.

[fol. 153] We would appreciate prompt advice from you as to whether this offer has been accepted subject to all necessary authorizations from the Interstate Commerce Commission.

If Greyhound should acquire said 500,000 shares, it would be Greyhound's intention to accept additional shares of R E A stock tendered to it by present R E A shareholders. It would be expected that Greyhound would pay cash for said shares up to but not exceeding $25 per share, that Greyhound would accept up to 749,594 shares, this being the number of shares in combination with the initial 500,000 shares which would give Greyhound a 50% interest in R E A and leave the railroads with the other 50% interest, and that as Greyhound acquired additional shares, its representation on the R E A Board would be increased proportionately up to 50% of the members on said Board.

It is understood that these additional shares are subject to a right of first refusal of the existing R E A shareholders. It is also understood that some of the railroads, apparently a minority, object to the acquisition by Greyhound of these additional shares. Greyhound does not want to create dissension among the R E A shareholders or "buy into a controversy." This in our opinion would delay and perhaps frustrate completely the improvements in service and revenues and the economies in operations previously discussed. Accordingly, Greyhound is willing at this time to proceed upon the basis of the foregoing offer, leaving to the future the question of the acquisition of additional shares by Greyhound and giving the railroads an opportunity to reconcile their views on this question.

These negotiations have been in progress for a number of months. It is Greyhound's earnest desire to bring them to a conclusion as rapidly as possible either by acceptance or rejection of the foregoing offer. We stand ready to

[fol. 154] cooperate with you in all respects to bring this matter to a successful conclusion.

Very truly yours,

/s/ GERALD H. TRAUTMAN
GERALD H. TRAUTMAN
Vice President and General Counsel, The Greyhound Corporation and Greyhound Lines, Inc.

cc - Mr. William B. Johnson, President
Railway Express Agency, Inc.

[fol. 155] Annex A(5)

BOARD OF DIRECTORS, July 28, 1964

GREYHOUND PROPOSAL FOR PARTICIPATION IN OWNERSHIP OF THE EXPRESS COMPANY

The President advised the Board of Directors that an offer dated July 16, 1964 by The Greyhound Corporation had been received and transmitted to the members of the Board by letter dated July 17, 1964. The President referred to the resolution of the Board of Directors adopted at its meeting on July 7, 1964 approving in principle an outline of the proposed program and directing the President, upon receipt of an offer by The Greyhound Corporation to call a special meeting of this Board to consider the method and procedure for submitting the formal proposal to the stockholders.

The President further advised that he had asked the law firm of Cravath, Swaine and Moore to prepare appropriate resolutions in accordance with resolution of the Board of Directors of July 7, 1964. The President presented to the Board as a docket item the resolutions that were prepared by the Cravath firm at his request and asked the Board what their desires were in that respect. Upon motion, duly

made, seconded and carried, the resolutions prepared by the Cravath firm were continued on the docket.

Upon further discussion, the Board of Directors concluded to designate a committee to meet with the Chief Executive Officer of The Greyhound Corporation for purpose of negotiating certain changes in the aforementioned offer dated July 16, 1964; whereupon, after full discussion, upon motion, duly made, seconded and carried, the following resolution was duly adopted unanimously:

> RESOLVED, that the President be instructed to constitute a committee made up of two Representatives from each of the three districts, and the President, to meet with the Chief Executive Officer of Greyhound Corporation for the purpose of obtaining an offer from Greyhound Corporation in all respects similar to the offer submitted to this Corporation on July 16, 1964, except as follows:
>
> [fol. 156] 1. A single price of $20 shall be offered for both the 500,000 shares of unissued stock and the stamped stock now held by present shareholders; and
>
> 2. The stated maximum of 749,594 shares shall be increased to 1,000,000 shares.

The Eastern Negotiating Committee represented that they expect to have a minimum of 900,000 presently outstanding shares available for sale to the Buying Group of railroad stockholders if they choose to exercise their right of first refusal.

[fol. 157] Annex A(6)

BOARD OF DIRECTORS, September 1, 1964
(Continued from July 28, 1964)

GREYHOUND PROPOSAL FOR PARTICIPATION IN OWNERSHIP OF THE EXPRESS COMPANY

The President referred to an offer by The Greyhound Corporation dated July 16, 1964 which was submitted to the Board at a Special Meeting July 28, 1964 pursuant to which Greyhound would acquire an interest in this corporation. The President further referred to the resolution adopted unanimously by the Board at the Special Meeting of July 28, 1964 wherein the President was instructed to constitute a committee to meet with the Chief Executive Officer of The Greyhound Corporation for the purpose of obtaining an offer by The Greyhound Corporation in all respects similar to the offer submitted to this corporation on July 16, 1964 except that a single price of $20.00 should be substituted for both the 500,000 shares of unissued stock and the stamped stock now held by present shareholders and that the stated maximum of 749,594 shares should be increased to 1,000,000 shares.

The President advised that pursuant to the aforementioned resolution a Committee comprised of the President, Messrs. Brown (PRR), Hoffman (NYCRR), Johnston (IC), Osborn (ACL), Peoples (SP) and Macfarlane (NP) met with Mr. Fred Ackerman, Chief Executive Officer of The Greyhound Corporation, and Gerald H. Trautman, General Counsel of The Greyhound Corporation in the office of the President on August 26, 1964.

The President reported that—

[fol. 158] The Committee communicated the substance of the July 28, 1964, resolution of this Board to the representatives of Greyhound. It was agreed that Greyhound would consider the terms suggested in the resolution and would report to the President subsequent to the meeting of the Board of Directors of Greyhound on August 27, 1964.

Immediately following the meeting of the Greyhound Board, Mr. Ackerman and Mr. Trautman reported to the President that Greyhound was reluctant to make another formal offer to R E A because it was not clear to them, in the light of past experience, that such a proposal would receive sufficient support from this Board and the R E A stockholders to insure that a satisfactory working agreement between R E A and Greyhound would be possible. Mr. Ackerman stated that he would look favorably upon a firm offer from R E A consistent with the terms set forth in the resolution of July 28, 1964 if it were adopted by such a substantial vote of the R E A Board and stockholders as to carry some measure of assurance that a constructive working relationship could be developed.

The President stated that in the opinion of the management of R E A it would be greatly in the interest of R E A to sell to The Greyhound Corporation 500,000 shares of authorized but unissued stock and to enter into working arrangements with Greyhound which would result in substantial savings for R E A and improved service to the public.

Accordingly, the President recommended that R E A offer to sell to The Greyhound Corporation 500,000 shares [fol. 159] of authorized but unissued stock of R E A at a price of $20.00 per share. The President also suggested that certain amendments to the By-Laws and certain resolutions of this Board should be enacted in order that the offer might be acceptable to Greyhound. The President therefore suggested that the Board adopt an appropriate resolution authorizing the President or any Vice President of this corporation to make a firm offer along the foregoing lines to The Greyhound Corporation.

Thereupon, on motion, duly made and seconded, the following resolution was duly adopted:

> RESOLVED, that the President or any Vice President of this corporation be, and he hereby is, authorized in the name and on behalf of this corporation to execute

and deliver to the Greyhound Corporation a firm offer to sell to The Greyhound Corporation 500,000 shares of authorized but unissued common stock of this corporation at the price of $20 per share, upon the following terms and conditions:

(a) The R E A By-Laws will be amended so that The Greyhound Corporation shall be permitted to name 20% of the R E A Board of Directors.

(b) The R E A Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,637,054 of outstanding 5% notes, issued originally to R E A's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.

(c) The R E A Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between R E A and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage.

[fol. 160] (d) The R E A Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some R E A stock to airlines and/or the general public if and when conditions appear favorable to the best interests of R E A as a company.

(e) The Greyhound Corporation shall offer to purchase up to 1,000,000 shares of the common stock of R E A from present shareholders at a price of $20.00 per share cash. Such offer to purchase will remain open and in full force and effect for a period of sixty days following the closing date of the trans-

action involving the 500,000 authorized unissued shares of R E A.

(f) The offer of R E A shall expire at 12:00 Noon on December 31, 1964.

(g) The offer of R E A may be accepted immediately, subject to all necessary authorizations from the Interstate Commerce Commission and to approval by the shareholders of this corporation of (i) the issuance to The Greyhound Corporation pursuant to said offer of 500,000 shares of authorized but unissued common stock of this corporation and (ii) the amendments to the By-Laws of this corporation required by subparagraph (a) of said offer.

The President then suggested that the Board adopt an appropriate resolution recommending to its railroad stockholders that they approve the issuance to The Greyhound Corporation pursuant to said offer of 500,000 shares of authorized but unissued common stock of this corporation and that the Board adopt such further resolutions as may be necessary to consummate the transactions contemplated by said offer, subject to all necessary approvals of the stockholders of this corporation and of the Interstate Commerce Commission. Thereupon, upon motion, duly made and seconded, the following resolution was adopted:

[fol. 161] RESOLVED, that this Board of Directors recommends to the stockholders of this corporation that they approve the issuance to The Greyhound Corporation pursuant to the offer set forth in the next preceding resolution of 500,000 shares of authorized by unissued common stock of this corporation.

The President then stated that in order to comply with the condition mentioned in paragraph (a) of the proposed offer, it would be necessary for the By-Laws of this corporation to be amended. He suggested to the Board of

Directors that the most feasible way to comply with such condition would be for the number of Directors-At-Large to be increased from five to seven and to permit the nomination of five such directors by The Greyhound Corporation, subject to said corporation holding at least 20% of the issued and outstanding stock. He stated that it would be preferable to phrase such amendment so that it relates to bus company holders generally rather than Greyhound specifically. The President further stated that it would be necessary to call a special meeting of the stockholders in order to approve the issuance by this corporation of the 500,000 shares of stock of this corporation to be issued to Greyhound, and to amend the By-Laws in accordance with the terms of the offer.

Thereupon, after full discussion and upon motion, duly made and seconded, the following resolutions were adopted:

RESOLVED, that this Board of Directors recommends to the stockholders of this corporation that, effective upon acceptance of the foregoing offer by The Greyhound Corporation, the By-Laws of this corporation be amended as follows:

[fol. 162] A. Section 2 of Article II of the By-Laws of this corporation shall be amended so as to read in its entirety as follows:

"An annual meeting of stockholders shall be held on the first Wednesday of April in each year at eleven o'clock A.M., at which meeting there shall be elected by ballot a Board of Directors, not to exceed twenty-five in number. There may be seven Directors-At-Large, and the others shall be the persons nominated by districts as provided in Section 8 of this Article; provided, however, that if at any time any corporation or corporations engaged in whole or in part in the common carriage of passengers by bus (hereinafter called Bus

Company Stockholders) are the holders of at least 20% of the stock issued and outstanding, the Bus Company Stockholders shall be entitled to nominate five of the Directors-At-Large in the manner provided in the next succeeding paragraph. The number, not to exceed eighteen, so nominated by districts shall be determined as provided in said Section 8. At such meeting there shall be transacted such other business as may properly be brought before the meeting.

"Not more than thirty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the Corporation shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, send to each Bus Company Stockholder a form of vote for the number of and for nominations for five Directors-At-Large. Each Bus Company Stockholder receiving the same shall thereupon name the persons proposed by such Bus Company Stockholder as nominees for five Directors-At-Large and return such vote to the Secretary with a statement of the number of shares voted by such Bus Company Stockholder in favor of each such nominee. Each Bus Company Stockholder shall be entitled to the same number of nominating votes for each of its said nominees for directors as the number of shares of stock [fol. 163] which such Bus Company Stockholder will be entitled to vote at such annual meeting. The Secretary shall canvass the nominating votes of the Bus Company Stockholders received by him prior to such annual meeting and shall report the same to the stockholders at the meeting. The five nominees

receiving the most nominating votes shall be the nominees for the five Directors-At-Large to be nominated by the Bus Company Stockholders."

B. Article XI of the By-Laws of this corporation shall be amended by deleting the period at the end thereof and adding an additional proviso at the end of said Article XI reading as follows:

"; and provided further that if any such alteration or amendment be made in the number of Directors of this corporation or in the method of nominating Directors-At-Large of this corporation, said affirmative vote of two-thirds of the stock issued and outstanding and entitled to a vote shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, include a majority of the issued and outstanding stock held by the Bus Company Stockholders."

RESOLVED, that a special meeting of the stockholders of this corporation (hereinafter in these resolutions sometimes called the Meeting) be, and it hereby is, called to be held at the office of this corporation, 219 East 42nd Street, New York, New York, at 10 A.M., Eastern Daylight Time, on October 1, 1964, to consider and vote upon the following:

(1) the proposed amendments to the By-Laws of this corporation recommended by the Board of Directors in the next preceding resolution (hereinafter called the By-Law Amendments);

(2) the approval of the issuance by this corporation of the 500,000 shares of capital stock of this corporation to be issued to The Greyhound Corporation as contemplated by the offer of R E A to the

Greyhound Corporation approved at this meeting (hereinafter called the Stock Approval); and

(3) to transact such other business as may properly come before the meeting or any adjournment thereof;

[fol. 164] RESOLVED, that Messrs. Frank E. Barnett, Fred Capri, Prime F. Osborn and William B. Johnson, or any of them, with full power of substitution, be, and they hereby are, appointed as a Proxy Committee to act on behalf of and represent such stockholders of this corporation as may appoint them their proxy to act for them at the Meeting and at any adjournment thereof;

RESOLVED, that the Secretary of this corporation be, and he hereby is, authorized and directed to give written notice of the Meeting, not less than 10 days before the day fixed for the Meeting, to each stockholder of this corporation entitled to vote at the Meeting, by mailing or causing to be mailed a copy of such notice in a postage prepaid envelope addressed to such stockholder at his post-office address as such address shall appear on the books of this corporation;

RESOLVED, that the Secretary of this corporation be, and he hereby is, authorized and directed to enclose or cause to be enclosed with each such notice to be mailed as provided in the next preceding resolution, copies of a Proxy Statement and Proxy in such form as shall be approved by the President or any Vice President of this corporation; and

RESOLVED, that Messrs. C. D. Vannoy and Alan F. Doniger be, and they hereby are, appointed Judges to conduct at the Meeting a vote of the holders of the capital stock of this corporation for and against the By-Law Amendments, the Stock Approval, and any

other vote taken by ballot at the Meeting and that such Judges in the exercise of the authority vested in them by the laws of the State of Delaware shall decide upon the qualifications of the voters and accept the votes of those qualified to vote for or against the By-Law Amendments and the Stock Approval, and when the vote thereon shall have been completed, count and ascertain the number of shares voted, respectively, for and against the By-Law Amendments and the Stock Approval, and declare whether the persons or bodies corporate holding two-thirds of the capital stock of this corporation entitled to vote thereon have voted for the By-Law Amendments and the Stock Approval, and make out a certificate stating (i) the number of shares of capital stock issued and outstanding and entitled to vote on the By-Law Amendments and the Stock Approval and (ii) the number of shares of capital stock voted for, and the number thereof voted against, the By-Law Amendments and the Stock Approval, respectively, and subscribe and deliver said certificate to the Secretary of this corporation.

[fol. 165] The President then stated that in order to comply with the condition referred to in Paragraph (6) of the R E A offer it would be necessary for this Board to adopt a resolution declaring the intention of refinancing, if necessary, its 5% notes, outstanding in the principal amount of $27,637,054, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends referred to in such notes.

Thereupon, after discussion, on motion, duly made, seconded and carried, the following resolution was duly adopted:

RESOLVED, that upon acceptance of the offer by The Greyhound Corporation, Messrs. William B. Johnson, President, and C. D. Vannoy, Vice President and Treasurer of the company, be, and they hereby are,

authorized to explore the possibility of refinancing the $27,637,054 principal amount of outstanding 5% notes, issued originally to this corporation's stockholders, or otherwise securing the waiver or cancellation of the prohibition against the payment of dividends which is contained in said notes; and upon the submission by such officers to this Board of a satisfactory program, this Board will take all such further action as may be necessary.

The President then stated that in order to comply with the condition referred to in Paragraph (c) of the R E A offer it would be necessary for the Board to declare its intention to work toward a long-term agreement between this corporation and Greyhound to consolidate operating functions and facilities.

Thereupon, upon full discussion and motion, duly made and seconded, the following resolution was duly adopted:

RESOLVED, that upon acceptance of the offer by The Greyhound Corporation, the President and any Vice Presidents whom he may designate are hereby authorized to undertake the negotiation of a long-term agreement with The Greyhound Corporation encompassing the consolidating of operating functions and [fol. 166] facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage; and upon the submission by the proper officers of this corporation to this Board of a satisfactory agreement, this Board will take all such further action as may be necessary to approve the same.

The President then said that in order to comply with the condition contained in Paragraph (d) of the R E A offer it would be necessary for the Board to adopt a resolution declaring its intention to consider seriously at some

time the sale of some of the stock of this corporation to airlines and/or the general public.

Thereupon, upon motion, duly made and seconded, the following resolution was duly adopted:

> RESOLVED, that, upon acceptance of the R E A offer by The Greyhound Corporation, if and when the conditions appear favorable to the best interests of this corporation, the President is authorized and directed to submit to this Board of Directors a program pursuant to which airlines and/or the general public could acquire interests in the stock of this corporation; and, upon receipt of such a recommendation, this Board will consider seriously a program of such nature.

The President then stated that it would be appropriate for the Board to adopt appropriate resolutions authorizing the filing of the necessary applications with the Interstate Commerce Commission for the necessary authorizations to consummate the transaction and authorizing the taking of all other action necessary for the consummation thereof.

Thereupon, upon motion, duly made and seconded, the following resolutions were duly adopted:

> RESOLVED, that William B. Johnson, President, and C. D. Vannoy, Vice President and Treasurer, be and they hereby are, and each of them individually hereby is designated and authorized as the executive officer to [fol. 167] make, sign, verify and file an application to the Interstate Commerce Commission under Sections 20a and 214 of the Interstate Commerce Act for authority to issue and deliver to The Greyhound Corporation 500,000 shares of this corporation's authorized and unissued common stock and for such other authority as may be necessary to effectuate the foregoing resolutions; and

RESOLVED, that the proper officers of this corporation be, and they hereby are, authorized to pay all such costs and expenses, and to take any and all other action and to execute, under the corporate seal of this corporation or otherwise, and deliver all such further instruments and documents as they in their discretion may deem necessary, proper or advisable in order to accomplish the purposes of the foregoing resolutions and each of them.

[fol. 168] Annex B

RAILWAY EXPRESS AGENCY, INCORPORATED

Notice of Special Meeting of Stockholders to be Held October 1, 1964

PLEASE TAKE NOTICE that by order of the Board of Directors a special meeting of stockholders of RAILWAY EXPRESS AGENCY, INCORPORATED, a Delaware corporation (hereinafter called the Corporation), will be held on Thursday, October 1, 1964, at 10 o'clock a.m., Eastern Daylight Time, at the office of the Corporation, 219 East 42nd Street, New York, N. Y., 10017, for the following purposes:

(1) to consider and act upon a proposal to approve the issuance by the Corporation of 500,000 shares of its authorized but unissued shares of Common Stock to The Greyhound Corporation, all as set forth more fully in Proposal No. 1 in the enclosed Proxy Statement;

(2) to consider and act upon a proposal to amend the By-Laws of the Corporation to increase the number of members of the Board of Directors from 23 to 25, to increase the number of Directors-At-Large from five to seven, to provide for the nomination of five Directors-At-Large by stockholders holding at least 20% of the issued and outstanding stock of the Corpo-

ration who are engaged in the common carriage of passengers by bus and to provide for a vote by such bus company stockholders upon certain amendments [fol. 169] to the By-Laws, all as set forth more fully in Proposal No. 2 in the enclosed Proxy Statement; and

(3) to transact such other business as may properly come before the meeting or any adjournment thereof.

ANY STOCKHOLDER WHO DOES NOT EXPECT TO ATTEND THE MEETING IN PERSON AND WHO WISHES TO VOTE UPON THE PROPOSALS REFERRED TO IN THE ENCLOSED PROXY STATEMENT IS RESPECTFULLY REQUESTED PROMPTLY TO INDICATE IN THE BOX NEXT TO EACH PROPOSAL WHETHER SUCH STOCKHOLDER DESIRES TO HAVE HIS SHARES VOTED FOR OR AGAINST SUCH PROPOSAL, DATE AND SIGN THE ACCOMPANYING PROXY AND RETURN THE PROXY IN THE ACCOMPANYING REPLY ENVELOPE.

BY ORDER OF THE BOARD OF DIRECTORS

Lawrence Berman,
Secretary

Dated: New York, N.Y., September 1, 1964.

[fol. 170] Annex B

RAILWAY EXPRESS AGENCY, INCORPORATED
219 East 42nd Street
New York, N.Y. 10017

PROXY STATEMENT

Pursuant to a resolution of the Board of Directors, this Proxy Statement has been prepared for use in connection with the delivery of Proxies for the special meeting of

stockholders of Railway Express Agency, Incorporated (hereinafter called the Corporation) to be held on Thursday, October 1, 1964, at 10 a.m., Eastern Daylight Time, at the offices of the Corporation, 219 East 42nd Street, New York, N. Y., for the purposes set forth in the accompanying Notice of such meeting. Stockholders will find enclosed a form of Proxy for use in connection with such special meeting. Shares represented by each properly signed Proxy received will be voted at the meeting in the manner indicated in such Proxy. Any Proxy is revocable at any time before the voting of such Proxy. Each share of the Corporation's Common Stock, par value $1 per share, issued and outstanding on said date is entitled to one vote on each matter to come before the meeting.

PURPOSE

The purpose of the special meeting is to consider recommendations by the Board of Directors (a) to authorize the issuance to The Greyhound Corporation (hereinafter [fol. 171] called Greyhound) of 500,000 shares of the corporation's authorized but unissued shares of Common Stock and (b) to amend the By-Laws of the Corporation. The proposed issuance of such shares of Common Stock to Greyhound would allow Greyhound to acquire an equity interest in the Corporation pursuant to the offer described below. The proposed amendments to the By-Laws are deemed necessary to comply with the terms of such offer.

THE GREYHOUND PROPOSAL

Some time ago, representatives of Greyhound approached the management of the Corporation to discuss the possibility of obtaining an equity interest in the Corporation with the ultimate purpose of achieving certain economies which could be realized through combination and correlation of certain of the facilities and services of Greyhound and the Corporation. During the last few months your management has had several discussions with Greyhound

officials as to an acceptable form of participation by Greyhound in the Corporation. As a result of such discussions, the Board of Directors of the Corporation, at its meeting on September 1, 1964, authorized the management of the Corporation to make an offer to Greyhound pursuant to which (i) the Corporation would sell to Greyhound 500,000 shares of the Corporation's authorized but unissued Common Stock at $20 per share and (ii) Greyhound would offer to purchase from the stockholders of the Corporation up to 1,000,000 shares of the Corporation's Common Stock at $20 per share. The offer of the Corporation is subject to [fol. 172] necessary approvals by the stockholders of the Corporation and by the Interstate Commerce Commission and is also subject to certain other conditions, all as set forth in the following resolution adopted by the Board of Directors of the Corporation on September 1, 1964:

> RESOLVED, that the President or any Vice President of this Corporation be, and he hereby is, authorized in the name and on behalf of this Corporation to execute and deliver to The Greyhound Corporation a firm offer to sell to The Greyhound Corporation 500,000 shares of authorized but unissued Common Stock of this Corporation at the price of $20 per share, upon the following terms and conditions:
>
> (a) The R E A By-Laws will be amended so that The Greyhound Corporation shall be permitted to name 20% of the R E A Board of Directors.
>
> (b) The R E A Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,637,054 of outstanding 5% notes, issued originally to R E A's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.
>
> (c) The R E A Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between R E A

and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage.

(d) The R E A Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some R E A stock to airlines and/or the general public if and when conditions appear favorable to the best interests of R E A as a company.

[fol. 173] (e) The Greyhound Corporation shall offer to purchase up to 1,000,000 shares of the Common Stock of R E A from present shareholders at a price of $20 per share cash. Such offer to purchase will remain open and in full force and effect for a period of sixty days following the closing date of the transaction involving the 500,000 authorized unissued shares of R E A.

(f) The offer of R E A shall expire at 12:00 Noon on December 31, 1964.

(g) The offer of R E A may be accepted immediately, subject to all necessary authorizations from the Interstate Commerce Commission and to approval by the shareholders of this Corporation of (i) the issuance to The Greyhound Corporation pursuant to said offer of 500,000 shares of authorized but unissued Common Stock of this Corporation and (ii) the amendments to the By-Laws of this Corporation required by subparagraph (a) of said offer.

The Board at said meeting also adopted appropriate resolutions to comply with the conditions set forth in subparagraphs (b), (c) and (d) of the foregoing resolution and further adopted resolutions recommending to the

stockholders that they (A) approve the issuance to Greyhound of 500,000 shares of Common Stock of the Corporation pursuant to the offer and (B) authorize the amendments to the By-Laws contemplated by the conditions set forth in subparagraph (a) of the foregoing resolution. The Board further called a special meeting of stockholders to be held on Thursday, October 1, 1964, at the offices of the Corporation, 219 East 42nd Street, New York, N.Y., to consider and act upon the following two Proposals providing for such approval and authorization. Although the management of the Corporation is not in a position to assure acceptance of the Corporation's offer by Greyhound, [fol. 174] if said proposals are adopted by a substantial vote of the stockholders of the Corporation, your management believes that the offer will receive favorable consideration by Greyhound.

The members of the Board present at the meeting at which the above action was taken and their affiliations were as follows:

Mr. Eaton Adams, Chicago, Rock Island & Pacific Railroad Company
Mr. T. M. Caiazza, The Atchison, Topeka and Santa Fe Railway Company
Mr. Fred Carpi, The Pennsylvania Railroad Company
Mr. Owen Clarke, The Chesapeake and Ohio Railway Company
Mr. F. J. Conrad, Missouri Pacific Railroad Company
Mr. G. W. Glenn, of the firm of Lord, Day and Lord
Mr. W. L. Grubbs, Louisville & Nashville Railroad Company
Mr. Covington Hardee, Union Pacific Railroad Company
Mr. C. J. Henry, Jr., The Baltimore and Ohio Railroad Company
Mr. W. M. Hoffman, The New York Central Railroad Company
Mr. W. B. Johnson, R E A Express

Mr. W. A. Johnston, Illinois Central Railroad Company
Mr. W. V. Lawrence, Seaboard Air Line Railroad Company
Mr. M. G. McInnes, Erie-Lackawanna Railroad Company
Mr. E. S. Miller, Maine Central Railroad Company
Mr. H. C. Murphy, Chicago, Burlington & Quincy Railroad Company
Mr. P. F. Osborn, Atlantic Coast Line Railroad Company
Mr. W. G. Peoples, Southern Pacific Company

All members present voted in the affirmative with the exception of Messrs. Caiazza, Conrad and Peoples who voted in the negative and Mr. Murphy who abstained.

PROPOSAL NO. 1:
APPROVAL OF STOCK ISSUANCE

Pursuant to the offer to Greyhound authorized by the Board of Directors on September 1, 1964, the Corporation [fol. 175] proposes to issue to Greyhound 500,000 shares of the Corporation's authorized but unissued shares of Common Stock. Stockholder approval of such issuance is required because the following resolution was adopted by the stockholders of the Corporation at a special meeting on September 17, 1962:

> Resolved that, if the stockholders of this Corporation approve at this meeting the proposals referred to in items 1 and 2 of the Notice dated August 1, 1962, of this Special Meeting of Stockholders, none of the 500,000 shares of authorized but unissued shares of Common Stock of this Corporation remaining after the reclassification referred to in item 1 of said Notice shall have been effected shall be issued by this Corporation unless such issuance is first approved by the

holders of at least two-thirds of this Corporation's Capital Stock issued and outstanding, such approval to be evidenced by vote of such stockholders at a duly held meeting of stockholders or by the consent in writing of such stockholders; and that any approvals at this meeting of such proposals set forth in items 1 and 2 of said Notice be subject to the ratification of this resolution by the Board of Directors of this Corporation by vote of at least a majority of all the Directors of this Corporation.

Accordingly, as Proposal No. 1, the Board recommends that the stockholders of the Corporation adopt the following resolution:

RESOLVED, that, subject to all necessary Interstate Commerce Commission authorizations, the stockholders of this Corporation approve the issuance by this Corporation to The Greyhound Corporation of 500,000 shares of authorized but unissued shares of Common Stock of this Corporation in accordance with the offer of this Corporation to The Greyhound Corporation authorized by the Board of Directors of this Corporation at its meeting on September 1, 1964.

The favorable vote of the holders of at least two-thirds of the Corporation's Common Stock issued and outstanding and entitled to vote will be required to approve such stock issuance.

[fol. 176] *The Board of Directors Recommends that the Stockholders Vote for the Approval of Stock Issuance Set Forth Above in Proposal No. 1.*

PROPOSAL NO. 2:
AMENDMENT OF THE BY-LAWS

The present number of directors of the Corporation is 23 and the number of Directors-At-Large is five. In order

to comply with the condition of the offer of this Corporation to Greyhound that Greyhound can name 20% of the Board of Directors of the Corporation, it is proposed that the number of members of the Board of Directors be increased from 23 to 25 and that the number of Directors-At-Large be increased from five to seven. It is further proposed that five Directors-At-Large be nominated by stockholders holding 20% of the issued and outstanding stock of the Corporation who are engaged in whole or in part in the common carriage of passengers by bus and that provision be made to require the approval of a majority of the Corporation's stock held by such bus company stockholders for any alteration or amendment in the number of directors of the Corporation or in the method of nominating Directors-At-Large of the Corporation authorized by the stockholders.

Accordingly, as Proposal No. 2, the Board recommends that the stockholders of this Corporation adopt the following resolution:

> RESOLVED, that, subject to the acceptance by The Greyhound Corporation of the offer of this Corporation to The Greyhound Corporation authorized by the Board of Directors of this Corporation at its meeting on September 1, 1964, the stockholders of this Corpo- [fol. 177] ration hereby amend the By-Laws of this Corporation (i) to increase the number of members of the Board of Directors from 23 to 25, (ii) to increase the number of Directors-At-Large from five to seven, (iii) to provide for the nomination of five Directors-At-Large by stockholders holding at least 20% of the issued and outstanding stock of this Corporation who are engaged in whole or in part in the common carriage of passengers by bus, and (iv) to provide for a vote by such bus company stockholders upon certain amendments to the By-Laws of this Corporation, said amendment of the By-Laws to be effected by

A. Deleting Section 2 of Article II of the By-Laws of this Corporation and substituting therefor the following:

"An annual meeting of stockholders shall be held on the first Wednesday of April in each year at eleven o'clock A.M., at which meeting there shall be elected by ballot a Board of Directors, not to exceed twenty-five in number. There may be seven Directors-At-Large, and the others shall be the persons nominated by districts as provided in Section 8 of this Article; provided, however, that if at any time any corporation or corporations engaged in whole or in part in the common carriage of passengers by bus (hereinafter called Bus Company Stockholders) are the holders of at least 20% of the stock issued and outstanding, the Bus Company Stockholders shall be entitled to nominate five of the Directors-At-Large in the manner provided in the next succeeding paragraph. The number, not to exceed eighteen, so nominated by districts shall be determined as provided in said Section 8. At such meeting there shall be transacted such other business as may properly be brought before the meeting.

"Not more than thirty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the Corporation shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, send to each Bus Company Stockholder a form of vote for the number of and for nominations for five Directors-At-Large. Each Bus Company Stockholder receiving the same shall thereupon name the persons proposed by such Bus Company Stockholder as

nominees for five Directors-At-Large and re-
[fol. 178] turn such vote to the Secretary with a statement of the number of shares voted by such Bus Company Stockholder in favor of each such nominee. Each Bus Company Stockholder shall be entitled to the same number of nominating votes for each of its said nominees for directors as the number of shares of stock which such Bus Company Stockholder will be entitled to vote at such annual meeting. The Secretary shall canvass the nominating votes of the Bus Company Stockholders received by him prior to such annual meeting and shall report the same to the stockholders at the meeting. The five nominees receiving the most nominating votes shall be the nominees for the five Directors-At-Large to be nominated by the Bus Company Stockholders."

B. Deleting the period at the end of Article XI of said By-Laws and adding an additional proviso at the end thereof reading as follows:

"; and provided, further that if any such alteration or amendment be made in the number of Directors of this Corporation or in the method of nominating Directors-At-Large of this Corporation, said affirmative vote of two-thirds of the stock issued and outstanding and entitled to a vote shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, include a majority of the issued and outstanding stock held by the Bus Company Stockholders."

The favorable vote of the holders of at least two-thirds of the Corporation's Common Stock issued and outstanding and entitled to vote will be required to authorize the

adoption of the proposed amendments to the By-Laws of the Corporation.

The Board of Directors Recommends that the Stockholders Vote For the Proposed Amendments of the By-Laws Set Forth Above in Proposal No. 2.

OTHER BUSINESS

The management does not intend to bring before the meeting any matters other than those set forth above, and [fol. 179] has no present knowledge that any other matters will or may be brought before the meeting by others. It is not intended that the persons named in the enclosed Proxy will vote Proxies in any way or on any matter other than as specifically indicated on such Proxies.

YOU ARE REQUESTED PROMPTLY TO INDICATE IN THE BOX NEXT TO EACH PROPOSAL WHETHER YOU DESIRE TO HAVE YOUR SHARES VOTED FOR OR AGAINST SUCH PROPOSAL, DATE AND SIGN THE ACCOMPANYING PROXY AND RETURN THE PROXY PROMPTLY SO THAT IT WILL BE AVAILABLE FOR USE AT THE MEETING.

BY ORDER OF THE BOARD OF DIRECTORS

Lawrence Berman,
Secretary

Dated: New York, N.Y., September 1, 1964.

[fol. 180] Annex B

RAILWAY EXPRESS AGENCY, INCORPORATED

Proxy for Special Meeting of Stockholders to be Held on October 1, 1964

KNOW ALL MEN BY THESE PRESENTS: That the undersigned stockholder of RAILWAY EXPRESS AGENCY, INCORPORATED, a Delaware corporation (hereinafter called the Corporation), does hereby name, constitute and appoint

FRANK E. BARNETT,
FRED CARPI,
PRIME F. OSBORN and
WILLIAM B. JOHNSON

or any of them, attorneys, agents and proxies for and in the name, place and stead of the undersigned, to appear and vote, according to the number of votes to which the undersigned shall be entitled, at the special meeting of stockholders of the Corporation, to be held Thursday, October 1, 1964, at ten o'clock, a.m., Eastern Daylight Time, at the office of the Corporation, 219 East 42nd Street, New York, N. Y., 10017, or at any adjournment thereof; with full power of revocation and substitution; and to vote:

☐ For

☐ Against

1. The proposal to approve the issuance to The Greyhound Corporation of 500,000 shares of the Corporation's authorized but unissued shares of Common Stock, as set forth in Proposal No. 1 in the Proxy Statement dated September 1, 1964.

[fol. 181]

☐ For

☐ Against

2. The proposal to amend the By-Laws of the Corporation as set forth in Proposal No. 2 in the Proxy Statement dated September 1, 1964.

At such meeting the said attorneys, agents and proxies shall have all the powers which the undersigned would have if personally present at such meeting and the undersigned hereby ratifies and confirms all that said attorneys, agents and proxies, their substitutes, or any of them, shall lawfully do by virtue hereof.

The said attorneys, agents and proxies, or their substitutes, are not authorized to vote this proxy with respect to the above-mentioned Proposals if no instruction is indicated in this proxy.

IN WITNESS WHEREOF, the undersigned stockholder has caused this proxy to be executed this day of , 1964.

.....
(Name of Stockholder)

by .....

.....
(Official Title)

Return to LAWRENCE BERMAN, Secretary, Railway Express Agency, Incorporated, 219 East 42nd Street, New York, N. Y. 10017.

For the past 10 years, for each item submitted to vote to the stockholders, furnish the following:

Item and date submitted to stockholders*:	a. The total outstanding voting power at the time:	b. The total number of shares voted:	c. The total number of shares which were not voted:	d. What percent of the stock was needed to approve the items voted o
4/6/55	1,000	998	2	more than 50
4/4/56	999	998	1	more than 50
4/3/57	999	981	18	more than 50
4/2/58	999	994	5	more than 50
4/1/59	998	997	1	more than 50
'6/60	965	958	7	more than 50
4/6/60 (proposition No. 1)	965	958	7	66-2/3
4/5/61	965	948	17	more than 50
4/5/61 (proposition No. 1)	965	948	17	66-2/3
4/4/62	963	939	24	more than 50
9/17/62 (proposition No. 1)	963	874	89	more than 50
9/17/62 (proposition No. 2)	963	874	89	more than 50
9/17/62 (proposition No. 3)	963	874	89	66-2/3
4/3/63	1,999,188	1,997,112	2,076	more than 50
4/1/64	1,999,188	1,990,884	8,304	more than 50

[fol. 182]

* On all dates, except as indicated, the only item before the stockholders as the election of directors.

For each board of directors meeting during the past 5 years, indicate:

Date of Bd. Mtg.	a. the Number of Directors Present	b. the Number of Directors Absent	c. the Number of Vacancies	d. the Number of Directors Constituting a Quorum	e. the Number of Affirmative Votes Necessary to Carry a Resolution
11/24/59	15	1	None	9	8
1/7/60	17	None	"	9	9
2/23/60	15	2	"	9	8
3/22/60	16	1	"	9	9
5/3/60	16	1	2	9	9
6/7/60	15	2	2	9	8
8/2/60	17	None	2	9	9
10/4/60	13	3	3	9	7
11/1/60	16	1	2	9	9
12/13/60	14	3	2	9	8
1/19/61	15	2	2	9	8
3/7/61	14	2	3	9	8
4/4/61	17	None	2	9	9
5/2/61	16	1	3	9	9
6/6/61	15	2	3	9	8
8/1/61	17	None	3	9	9
9/12/61	14	3	3	9	8
9/22/61	16	1	3	9	9
11/7/61	17	1	2	10	9
12/5/61[a]	16	2	2	10	9
2/6/62	15	3	2	10	8

[a] One item presented to the Board required and received approval by at least 3/4 of the Board members nominated by the rail companies or 12 railroad nominated directors.

[fol. 184]

Date of Bd. Mtg.	a. the Number of Directors Present	b. the Number of Directors Absent	c. the Number of Vacancies	d. the Number of Directors Constituting a Quorum	e. the Number of Affirmative Votes Necessary to Carry a Resolution
3/6/62	16	2	2	10	9
5/1/62	17	1	2	10	9
6/5/62	17	1	2	10	9
7/17/62	18	None	2	10	10
9/6/62	16	2	2	10	9
10/2/62	16	2	5	10	9
12/4/62	17	1	5	10	9
2/5/63	14	4	5	10	8
3/5/63	12	6	5	10	7
5/7/63	17	1	5	10	9
6/11/63	16	2	5	10	9
7/23/63	17	1	5	10	9
9/5/63	15	3	5	10	8
10/9/63	16	2	5	10	9
11/5/63	15	3	5	10	8
12/3/63	13	5	5	10	7
2/4/64	15	3	5	10	8
3/3/64	18	None	5	10	10
4/7/64	16	2	5	10	9
6/9/64	17	1	5	10	9
7/7/64	18	None	5	10	10
7/28/64	20	"	3	11	11
9/1/64	18	2	3	11	10
10/6/64	19	1	3	11	10

[fol. 185] Annex E

[Letterhead of R E A EXPRESS, New York, N. Y.]

October 27, 1964

Mr. Gerald H. Trautman, Esq.
Office of the General Counsel
The Greyhound Corporation
601 California Street
San Francisco, California

Dear Mr. Trautman:

The Interstate Commerce Commission, by George W. Metzger, Chief, Section of Proceedings, has promulgated certain questions in connection with the Application of this company in Finance Docket No. 23324.

This company is not able to make full and complete answers to four of the questions as certain of the information is solely within the knowledge of the management of The Greyhound Corporation. Specifically, the questions are as follows (the numbers correspond with the numbers given by the ICC):

"5. Are there any existing interlocking directors between Greyhound, its affiliates and subsidiaries, on the one hand, and REA, its affiliates and subsidiaries, on the other hand? If so, please identify.

"6. Is it contemplated or anticipated that Greyhound will dispose of any of the REA stock to any of its, Greyhound's, affiliates or subsidiaries?

"7. Are there any commitments by any of present REA stockholders to sell their holdings to Greyhound? If so, give details.

"8. After giving effect to the proposed transaction and the election of the so-called 'Greyhound Directors,' [fol. 186] identify, by name and business affiliation, each of the 25 directors."

I have been informed that question No. 5 has been amended by the Commission to read as follows (new wording italicized:

"5. Are there any existing interlocking directors between Greyhound, its affiliates and subsidiaries on the one hand and REA, its affiliates and subsidiaries *and the owning railroads, their subsidiaries and affiliates* on the other hand? If so, please identify."

In answer to question No. 5, this company, at the present time, has no knowledge of any existing interlocking directors. In answer to question No. 6, this company has no knowledge of what Greyhound contemplates in regard to the disposition of the R E A stock to any of Greyhound's affiliates or subsidiaries. In answer to question No. 7 R E A has no knowledge as to any commitments by any present R E A stockholder to sell their holdings to Greyhound.

In regard to question No. 8, I am able at the present time to list only the 20 present directors of this company as this company has no knowledge as to the identity and business affiliation of the so-called "Greyhound Directors" in the event the proposed transaction is consummated.

I would appreciate your supplying me with any and all information which will enable R E A to fully answer questions numbered 5, 6, 7 and 8.

Sincerely,

Original Signed
LAWRENCE BERMAN
Corporate Secretary

bc: Mr. Henry P. Riordan
WJT

[fol. 187] Annex E

THE GREYHOUND CORPORATION

140 South Dearborn Street
Chicago 3, Illinois

OFFICE OF THE GENERAL COUNSEL
601 California Street
San Francisco, California October 31, 1964

AIR MAIL

Mr. Lawrence Berman
Corporate Secretary
Railway Express Agency,
Incorporated
219 East 42nd Street
New York, New York 10017

Railway Express Agency, Incorporated
Application—ICC Finance Docket No. 23324

Dear Mr. Berman:

This will acknowledge your letter of October 27, 1964, inquiring as to the answers to certain questions posed by Mr. George W. Metzger, Chief, Section of Proceedings, Interstate Commerce Commission. The answers to those questions are as follows:

Question 5 as revised. There are no existing interlocking directors between Greyhound, its affiliates and subsidiaries, on the one hand, and R E A, its affiliates and subsidiaries and the owning railroads, their affiliates and subsidiaries, on the other hand.

Question 6. It is not contemplated or anticipated that The Greyhound Corporation will dispose of any of the R E A stock to any of its affiliates or subsidiaries.

Question 7. There are no commitments by any of the present R E A stockholders to sell their holdings to Greyhound.

Question 8. It is contemplated that the Greyhound directors on the R E A Board would be as follows:

[fol. 188] F. W. Ackerman, President and Chairman of the Board of The Greyhound Corporation and an officer and director of several other corporations.

Frederick L. Ehrman, partner, Lehman Brothers, and an officer and director of several other corporations.

Arthur M. Hill, Chairman of the Executive Committee of The Greyhound Corporation, member of the Executive Committee and director of the International Telephone and Telegraph Corporation, as well as an officer and director of other corporations.

T. S. Peterson, former President of Standard Oil Company of California, member of the Board of Directors of The Greyhound Corporation, and an officer and director of several other corporations.

Raymond F. Shaffer, Executive Vice President of The Greyhound Corporation and an officer and director of certain other corporations.

I trust that this information will enable you to comply with Mr. Metzger's request.

Very sincerely yours,

/s/ Gerald H. Trautman
Gerald H. Trautman

Annex F

[fol. 189] *After giving effect to the proposed transaction and the election of the so-called "Greyhound Directors", identify, by name and business affiliation, each of the 25 directors.*

Name	*Business Affiliation*
A. *Eastern District Directors:*	
Fred Carpi	Vice President-Traffic, The Pennsylvania Railroad Co.
Owen Clarke	Vice President, The Chesapeake & Ohio Railway Company
Garrard W. Glenn	Member of the law firm of Lord, Day & Lord
Charles J. Henry, Jr.	Vice President-Marketing, The Baltimore and Ohio Railroad Company
Wayne M. Hoffman	Executive Vice President, The New York Central RR Co.
Milton G. McInnes	Vice President-Staff, Erie-Lackawanna Railroad Company
E. Spencer Miller	President, Maine Central Railroad Co.
B. *Western District Directors:*	
Frank E. Barnett	Vice President & General Counsel, Union Pacific Railroad Company
Theodore M. Caiazza	Assistant Vice President-Traffic, The Atchison, Topeka & Santa Fe Railway Co.

Name	*Business Affiliation*
Frank J. Conrad	Vice President-Traffic, Missouri Pacific Railroad Co.
R. Ellis Johnson	President, Chicago, Rock Island and Pacific Railroad Co.
Harry C. Murphy	President & Chairman of Executive Committee, Chicago, Burlington & Quincy Railroad Co.
William G. Peoples	Vice President-Traffic, Southern Pacific Company

[fol. 190]

C. *Southern District Directors:*

William L. Grubbs	Vice President & General Counsel, Louisville and Nashville RR Co.
Robert S. Hamilton	Vice President-Marketing & Research, Southern Railway Co.
Wayne A. Johnston	President, Illinois Central Railroad Co.
Prime F. Osborn	Vice President & General Counsel, Atlantic Coast Line Railroad Co.
James R. Thorne	Executive Vice President, Seaboard Air Line Railroad Co.

Name	*Business Affiliation*
D. *Directors-at-large:*	
William B. Johnson	President, Railway Express Agency, Incorporated
C. E. Woolman	President, Delta Air Lines
E. *Greyhound Directors:*	
F. W. Ackerman	President and Chairman of the Board, The Greyhound Corporation; officer and director of several other corporations
Frederick L. Ehrman	Member of the investment banking firm of Lehman Brothers; officer and director of several other corporations
Arthur M. Hill	Chairman of the Executive Committee of The Greyhound Corporation; member of the Executive Committee and director of International Telephone and Telegraph Corporation; officer and director of several other corporations
T. S. Peterson	Former President of Standard Oil Company of California; director of The Greyhound Corporation; officer and director of several other corporations
Raymond F. Shaffer	Executive Vice President of The Greyhound Corporation; officer and director of several other corporations

[fol. 191] Annex G

MEMORANDUM OF UNDERSTANDING REACHED BY R. F. SHAFFER, EXECUTIVE VICE PRESIDENT, GREYHOUND LINES, INC. AND TRUMAN T. MOORE, VICE PRESIDENT, OPERATIONS, R E A EXPRESS OF POTENTIAL BENEFITS BY CONSOLIDATION OR MERGER OF CERTAIN ACTIVITIES OF THE TWO COMPANIES.

Below is detailed our judgments of potential savings or advantageous arrangements for the Greyhound Corporation and R E A Express in the event the two companies would merge or consolidate certain activities. The amounts contained herein are estimates reached after fullest possible consideration and judgment on our parts, but because of the short time permitted, are made without the benefit of field study data. It is our joint opinion that these estimates are as accurate as could be determined under these circumstances. Projections have been made on both a short and long-range basis and there has also been included a projection of increases in volumes that would result on the same basis.

All of the items studied could be consummated without full ownership of R E A by Greyhound, except that the potential consolidation of Greyhound exclusive facilities with R E A exclusive facilities is dependent to some degree upon the percentage of ownership of R E A by Greyhound.

In reaching our conclusions we have proceeded on the assumption that any labor difficulties arising from such steps as recommended could be resolved.

The following is our judgment:

POTENTIAL CONSOLIDATION OF GREYHOUND EXCLUSIVE FACILITIES WITH R E A FACILITIES

The growth of Greyhound's bus express revenue has been at a rate of approximately $3 million per year. This has been a sustained growth over a long-term period of

more than five years, and it is forecasted to continue and will undoubtedly cause Greyhound's existing facilities to become congested and uneconomical to operate.[1] At that time if R E A would perform the terminal services, other than loading and unloading of buses, now performed by Greyhound definite economies would accrue to Greyhound and at the same time R E A would receive added revenues. This situation has reached the point where Greyhound's present plans in New York City are to move the package express business presently located in the Port Authority Terminal to a portion of their new garage facilities which has been set aside exclusively for package express. When [fol. 192] such moves take place any absorptive capacity of Greyhound's existing forces at their passenger terminals for handling package express will be gone and the handling cost for package express will become a direct out-of-pocket cost at the new location. From R E A's standpoint it is estimated that if we provide all sales and services for Greyhound except for loading and unloading buses, there should remain 50 per cent of gross revenue for line-haul cost and sharing of any balance by the two companies. If the current rate of growth of Greyhound continues, somewhere two to five years from now these operations for package express handling will have to be located away from the passenger express terminal except for the loading and unloading of buses. When growth requires this expansion and separation, at that time, with R E A performing this terminal service, it is our feeling that possible economies from $2 million to $4 million per year would exist. Further investigation of this matter would have to be made giving consideration to Greyhound's percentage of ownership.

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[1] It must be emphasized at this point that in the past Greyhound has had considerable absorptive capacity in its passenger terminals that has made it possible for the ratio of direct expense to revenue to remain relatively low.

ECONOMIES EFFECTED BY THE COMBINING OF GARAGE OPERATIONS OF R E A EXPRESS WITH THOSE OF GREYHOUND CORPORATION

Analysis shows both Greyhound and R E A have garage operations at 37 cities where Greyhound could absorb the service and maintenance work on all R E A automotive equipment. In addition, they have headquarters staff and field supervision sufficient with the addition of a few people to take care of the staff work and field supervision on all R E A automotive equipment. There are common garages at another 11 locations where further study would be required to determine if such facilities could be consolidated. The consolidation of the 37 garage locations plus the absorbing of headquarters and field supervision and only to a small degree reducing existing actual mechanical forces plus other economies will produce a shared savings of $1,500,000. In addition these changes would eliminate from existing R E A lease arrangements for facilities an annual expense of $12,137. Further, it would make available for sale 11 R E A company-owned garages located on owned land at an approximate sales value of $2,787,000.

COMBINED USE OF COMMUNICATION FACILITIES, DATA PROCESSING EQUIPMENT AND MACHINE ACCOUNTING BY GREYHOUND AND R E A EXPRESS

In this area it appears that R E A Express is somewhat further advanced in data processing and machine accoun ing. Greyhound presently spends in the neighborhood of $6 million in accounting and communications. By utilizing [fol. 193] joint communication facilities and the present and proposed data processing system and machine accounting of R E A, it is estimated that economies approximating $600,000 would be shared by the two companies. In addition, by jointly billing all customer accounts and other accounting procedures in the field to the extent possible, it is estimated there would be a shared savings of $500,000.

COMBINING THE SALES AND ADVERTISING EFFORT OF R E A AND GREYHOUND PACKAGE EXPRESS

It is felt that with a sufficient force to insure a proper coverage for Greyhound the commission solicitation force of Greyhound for package express could be eliminated with that service being performed by existing R E A Express salesmen. The elimination of this effort on the part of Greyhound's salesmen should permit economies in the neighborhood of $350,000 which economies can be shared by both companies.

By combining the surface transportation advertising program of R E A with Greyhound's and utilizing the existing Greyhound advertising agency plus eliminating the current R E A advertising division and supplementing Greyhound's advertising force by one man should result in an anuual savings to R E A and Greyhound of approximately $130,000.

POSSIBILITY OF CONSOLIDATING GREYHOUND TICKET OFFICES AND PACKAGE EXPRESS TERMINALS OPERATED ON A COMMISSION BASIS WITH EXCLUSIVE R E A OFFICES

At 683 points Greyhound operates on a commission basis bus and package express depots. At these same communities R E A operates an exclusive express office. At all these points where the physical location of the R E A office would be satisfactory from both a passenger and package express standpoint and where the R E A representation was sufficient, consolidation could be made of these two operations. The estimated to be shared savings would be approximately $1,500,000.

POSSIBILITIES OF ADDITIONAL VOLUME GENERATED FOR R E A IN AIR OR SURFACE SERVICE UTILIZING GREYHOUND BUS OPERATION AS A COMPLEMENT TO THAT SERVICE

A very strong possibility exists for what could be termed a package bus distribution service tied in with R E A's Air [fol. 194] Express, highway or rail operations. The consolidation of effort by the two companies, Greyhound and R E A, would create a new market with revenue opportunity arising from a complete package express service to the public. This would be principally in two categories —air express-bus express service and rail-bus express service.

By the new ability of Air Express to reach off-airline points with an expedited bus package express service, it is believed that a 10% increment in present total Air Express revenues is possible to R E A or $6 million annually. Greyhound by tacking on the expedited bus express service would realize $1,500,000 in bus express revenues. It is our opinion that this new market of $7,500,000 would have a growth potential of 10% per year thereafter or approximately $750,000, the first year.

Rail-bus express service would create a new capability for the two carriers to compete in the ltl market. The only foreseeable limitation to the growth of this service would be the physical space limitations of Greyhound's fleet.

It is estimated that the rail-bus express service would generate $6 million in new business to the Express Company which could be shared by the two companies in the ratio of 60/40 thereby increasing R E A's gross revenues by $3,600,000 and increasing the bus express revenues by $2,400,000.

POSSIBLE UTILIZATION OF UNUSED LINE-HAUL SPACE IN GREYHOUND BUSES FOR R E A EXPRESS TRAFFIC MOVING AT EXPRESS RATES

There presently exists the ability to handle in line-haul service approximately 50% more package express traffic or its equivalent in space utilization in Greyhound buses. This space is predominantly available in the daylight or other than peak hours. Where R E A could utilize this space Greyhound could and would offer to R E A an attractive line-haul cost. In the main, this space exists between other thar principal cities so that it would replace in the majority R E A over-the-road operations utilizing small equipment or third party truck routes. This will eliminate the expense of R E A's over-the-road operations in this category or the third party truck routes and will permit a sharing in an amount approximating $1 million by the two companies.

Greyhound's projected equipment changes on new buses will increase the space availability by about 200% in their standard buses and 50% in their scenic cruisers making available additional line-haul for these off-main line points. [fol. 195] This should permit R E A to utilize this space and we estimate an additional $1 million on a long-range basis of about five years hence could be shared between R E A and Greyhound.

These sharings come about by Greyhound's receiving this additional revenue for haul for their part and R E A's portion by being provided a lesser line-haul cost.

OTHER POSSIBILITIES OF ECONOMIES OR IMPROVEMENTS BY THE COMBINING OF EFFORTS ON THE PART OF GREYHOUND AND R E A

1. By establishing a joint Purchasing Division economies in actual purchasing cost on gasoline, oil, tires and other materials should result. In addition the employees engaged in purchasing efforts on the part of both com-

panies if such forces were consolidated could be reduced. The combining of these two savings will produce a sharing on the part of both companies in $700,000 per year savings.

2. Utilizing the existing Greyhound highway operations supervisory force of 43 safety supervisors and 77 line representatives should permit R E A and Greyhound to share in economies by eliminating comparable forces in R E A by approximately $150,000. In this same area the safety program for facilities and road equipment of Greyhound would be carried over to R E A. On a long-range basis projecting growth in OTR operations another $50,000 per year should be saved in approximately two years.

3. Greyhound presently has little force in Technical Development and Equipment Research. By making available the service of R E A's Technical Service and Research group for study of baggage and express operations, conveyor adaptations and other research, R E A could materially assist Greyhound and both companies participate in an approximate $50,000 savings.

4. There exists a possibility of some consolidated effort or assistance between the Boothe Leasing Corporation of Greyhound and R E A Leasing Corporation. This would require study and analysis.

5. In connection with the Greyhound package express there exists the possibility of additional revenues accruing to R E A by performing a pick-up or delivery or pick-up and delivery of Greyhound package express under a separate or supplemental tariff to be published by Greyhound for a specified rate for this service.

6. Greyhound's subsidiary, Greyhound Van Lines, could realize savings in purchasing of line-haul transportation [fol. 196] by utilizing some form of Rail Container Service

for less than van load volume. This could be provided by R E A, resulting in additional revenues to the Express Company.

7. All R E A agencies and salaried offices could act as Greyhound Van Lines sales agents in cities throughout the U. S. A. thereby realizing additional income on sales leads and orders. Greyhound Van Lines could obtain considerable additional coverage of the market which will result in added revenue to the Van Lines.

In summary, the features brought out in this memorandum will produce a short-range estimated savings per annum of $6,380,000 and on a long-range basis, looking forward to from two to five years hence, a total savings at that time including the short-range projection of from $9,430,000 to $11,430,000. It is our feeling that as knowledge of machine accounting, communications and data processing grows, the savings in this area will substantially increase.

It is the very strong feeling that if the conditions of this memorandum are placed in effect, there would be a substantial improvement volume-wise for both Greyhound and R E A for various reasons outlined, estimated to be $9,600,000 for R E A and $3,900,000 for Greyhound. Further, these changes would permit R E A the opportunity to sell facilities at an estimated value of $2,787,000.

To the best of our ability our opinions are entirely workable.

/s/ R. F. Shaffer
R. F. Shaffer, Executive
Vice President, Greyhound Lines, Inc.

/s/ Truman T. Moore
Truman T. Moore, Vice President
Operations, R E A Express

Dated this 18th day
of June, 1964.

RECAPITULATION BY AREAS OF SAVINGS ON A MERGED OR CONSOLIDATION SITUATION FOR GREYHOUND AND R E A PROJECTED SHORT-RANGE AND LONG-RANGE. THE LONG RANGE PROJECTION INCLUDES CONTINUATION OF SHORT-RANGE SAVINGS

Area	Short Range Projected Savings Per Annum	Long Range Projected Savings Per Annum
Vehicle servicing and maintenance	$1,500,000	$1,500,000
Combined sales effort	350,000	350,000
Advertising	130,000	130,000
Consolidation of Greyhound commissions offices with R E A exclusive offices	1,500,000	1,500,000
Using Greyhound's available additional line-haul capacity	1,000,000	2,000,000
Combined purchasing of oil, gasoline, etc.	700,000	700,000
Greyhound supervising R E A road operations	150,000	200,000
Combining Greyhound exclusive offices with R E A exclusive offices	-	2,000,000 to 4,000,000
Combine Technical Service and Research	50,000	50,000
Combining communications, machine accounting, data processing - R E A doing field rendition of statements	1,000,000	1,000,000
	$6,380,000	$9,430,000 to $11,430,000

[fol. 197]

[fol. 198] Annex G

APPENDIX TO MEMORANDUM DATED JUNE 18, 1964 PREPARED BY R. F. SHAFFER, EXECUTIVE VICE PRESIDENT, GREYHOUND LINES, INC. AND T. T. MOORE, VICE PRESIDENT, OPERATIONS, R E A EXPRESS

In the event that Greyhound and R E A proceed with consolidation of activities, a possibility exists whereby Greyhound Van Lines, a wholly owned subsidiary of Greyhound Lines, Inc. and a nationwide household goods carrier, would purchase from R E A, container transportation service in the amount of $600,000 a year. After five years this requirement would reach $2,000,000 annually. This assumes that R E A can provide a rate equal to or better than the Van Lines' present rate.

R E A by acting as a sales agent for Greyhound Van Lines at its 1,224 exclusive salaried offices can develop additional revenue for Greyhound Van Lines of $2,600,000 annually, for which R E A would receive commissions amounting to $260,000 annually.

Under the assumption that R E A can offer a rate equal to or better than the Van Lines now enjoy, Greyhound Van Lines would purchase transportation, either in large containers or vans, in an amount equal to $900,000 a year for the first year. It is projected that at the end of five years that Van Lines would purchase transportation up to $2,000,000 a year.

[fol. 199] [File endorsement omitted]

[fol. 200]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Washington, D. C.

[Title omitted]

Finance Docket No. 23324

REPLY OF RAILWAY EXPRESS AGENCY, INCORPORATED TO ALL PROTESTS AND PETITIONS—Filed November 17, 1964

I

On October 7, 1964, Railway Express Agency, Incorporated (REA) initiated this proceeding by filing with the Interstate Commerce Commission an application (assigned Finance Docket No. 23324) under Sections 20a and 214 of the Interstate Commerce Act for authority to issue 500,000 shares of REA's Common Stock, par value $1 per share, to The Greyhound Corporation (Greyhound) pursuant to [fol. 201] the terms and conditions set forth in the application. Subsequently, by letter dated October 12, 1964, and Return to Information Request to REA of even date herewith, REA supplied the Commission with additional information requested by it.

REA submits that the facts described in such documents demonstrate conclusively that the proposed issue satisfies the standards set forth in Sections 20a and 214 of the Interstate Commerce Act and should be approved by the Commission *without further proceedings.*

II

Since the filing of REA's application, various parties have filed protests and petitions with the Commission

attempting to interject extraneous, premature and irrelevant issues into this proceeding. Such petitions further request that the Commission hold a public hearing at which such issues may be considered.

REA submits that all the issues raised by such protests and petitions are outside the proper scope of this proceeding, *namely*, whether the proposed stock issue is (a) for some lawful object within REA's corporate purposes and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance [fol. 202] by REA of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) reasonably necessary and appropriate for such purpose. The essence of all the opposing petitions filed is that the proposed stock issue will give Greyhound "control" of REA in violation of Section 5 of the Interstate Commerce Act or that the issuance and sale of the stock to Greyhound will somehow result in harmful effects upon competition. REA will demonstrate, in this Reply, that the proposed stock issue will not have such effects and that questions of "control" and effect upon competition are premature in this proceeding and without factual basis. Accordingly, the Commission should not require a public hearing on such extraneous issues. Rather, the Commission should approve the proposed stock issue forthwith.

III

REA has received copies of the following petitions filed in this proceeding by third parties:

1. Petition for Leave to Intervene and Protest of The Denver and Rio Grande Western Railroad Company, dated October 20, 1964.

2. Petition of Freight Forwarders Institute for Right to Intervene and for a Formal Hearing in the [fol. 203] Matter, dated October 20, 1964.

3. Petition for Leave to Intervene and Protest of Southern Pacific Company, dated October 20, 1964.

4. Petition of Transcontinental Bus System, Inc., et al.,* Seeking Leave to Intervene, dated October 21, 1964.

5. Petition of Transcontinental Bus System, Inc., et al.,* to Require Filing Under Section 5, Interstate Commerce Act, and to Consolidate, dated October 21, 1964.

6. Petition for Leave to Intervene and Protest of The Atchison, Topeka and Santa Fe Railway Company, dated October 21, 1964.

7. Joint Petition for Leave to Intervene and Protest and Request for Oral Hearing of National Trailways Bus System, dated October 22, 1964.

8. Joint Petition for Leave to Intervene, and Protest, of St. Louis Southwestern Railway Company and St. Louis Southwestern Railway Company of Texas, dated October 23, 1964.

9. Petition for Leave to Intervene and Protest of The Missouri Pacific Railroad Company, dated October 30, 1964.

10. Petition for Leave to Intervene and Protest of American Trucking Associations, Inc., and Regular Common Carrier Conference and Request for Oral [fol. 204] Hearing, dated November 9, 1964.

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* The petitions signed "Transcontinental Bus System, Inc., et al." are said to be filed by Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Bayshore Buslines, Inc., Continental Bus System, Inc., Continental Crescent Lines, Inc., Continental Panhandle Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Inc., Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Inc., Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Bus Lines, Inc., and Muscatine, Davenport and Clinton Bus Company.

11. Petition of the United States Department of Justice For Leave to Intervene, For Consolidation of this Proceeding with a Proceeding to Determine the Lawfulness of the Proposed Transaction under Section 7 of the Clayton Act, For a Full Evidentiary Hearing, and a Pre-Hearing Conference.

(Such petitions will hereinafter sometimes be referred to by the number appearing before each, respectively.)

In addition, Greyhound filed a Petition for Leave to Intervene in Support of the Application, dated November 6, 1964.

Although 11 petitions were filed in opposition to REA's application, there are actually only four types of parties filing such petitions:

(1) dissenting stockholders (petitions nos. 1, 3, 6, 8 and 9) of REA who were out-voted at the special meeting of REA stockholders held to authorize the proposed issue and are apparently attempting to frustrate the desires of the overwhelming majority of REA stockholders;

(2) bus companies (petitions nos. 4, 5 and 7) who are competitors of Greyhound and desire the Commission to hear their grievances against Greyhound;

(3) freight forwarders and truckers (petitions nos. 2 and 10) who are, to some extent, competitors of REA and who do not want REA to strengthen its financial [fol. 205] position; and

(4) the Justice Department (petition no. 11) which requests the Commission to consolidate this 20a and 214 proceeding with some kind of a proceeding involving "Section 7 of the Clayton Act."

These parties raise various points in their petitions and ask the Commission to hold a hearing thereon. REA be-

lieves that REA and the Commission are under no obligation to accept the invitation of these parties to discuss such extraneous points. REA will, however, in this Reply, deal briefly with the substance of such points and demonstrate to the Commission that:

(1) the issues raised by the petitioners are premature;

(2) the present application does not raise an issue of "control" under Section 5 of the Interstate Commerce Act; and

(3) no formal hearing is necessary.

1. *Issues raised by the petitioners are premature.*

If this proceeding is limited to the subject matter properly before the Commission, it will become evident that the petitioners and protestants will not be harmed by the proposed issue. Petitions nos. 1, 3, 6, 8 and 9 have been filed [fol. 206] by stockholders of REA who voted against the proposed issue when it was approved at the stockholders' meeting on September 1, 1964, by over 80% of REA's stockholders. Petitions nos. 3, 6, 8 and 9 have been filed by or on behalf of corporations whose officers, sitting on the REA Board, joined in the unanimous vote of the REA Board on July 28, 1964, directing the President of REA to negotiate an agreement with Greyhound on the same terms as were finally agreed upon. Even disregarding this inconsistency by these petitioners, considering the favorable price to be received by REA for the shares sold and its obvious need for additional equity capital, it is difficult to see how any legitimate stockholder interest can be harmed if the Commission approves the proposed issue. In view of the fact that no reasons are set forth in such petitions to show that the proposed issue does not meet the standards of Sections 20a and 214, it appears clear that the petitions are merely an effort by a small minority to delay the ac-

complishment of a step which the vast majority of REA's stockholders believe to be in the best interests of the corporation.

Petitions nos. 4, 5 and 7 have been filed by bus companies competing with Greyhound. These bus companies claim they will be injured by control of REA by Greyhound and by an "amalgamation" of REA and Greyhound. The fallacy of the position taken by the bus companies is com-
[fol. 207] mon to all petitions—they seek to raise and have the Commission consider an issue not presented by the facts. REA has demonstrated, and will demonstrate herein, that there is no possibility of control by Greyhound by the acquisition of a 20% stock interest. Nor is there any question of "amalgamation" of REA and Greyhound. In the unlikely event that any such condition should eventuate, all petitioners will have ample opportunity to participate in an appropriate proceeding under Section 5 of the Interstate Commerce Act. In this connection, it must be noted that Greyhound, in its petition filed herein, has agreed that if Greyhound should subsequently acquire "any additional stock interest which would even approach a position of control, Greyhound would file an appropriate application under Section 5 of the Interstate Commerce Act". Unless and until such time arrives, petitioners should not be permitted to delay an application under Sections 20a and 214 by the introduction of such extraneous issues.

Petitions nos. 2 and 10 have been filed by associations of freight forwarders and truckers, respectively. These associations have opposed virtually every forward step taken by REA since its reorganization in 1959. In proceeding after proceeding it has been asserted that REA is "abandoning its traditional role as an express carrier". The
[fol. 208] Commission has, without exception, and as recently as November 12, 1964,* rejected this argument. The

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* *Freight, All Kinds, L.C.L., Container Charges—U.S.A.*, 323 I.C.C. 468 (1964).

freight forwarders cannot now be permitted to introduce this extraneous argument in a Section 20a proceeding. The fact is, of course, that REA is an express company regulated under Part I of the Interstate Commerce Act and has been such since long before the freight forwarders came under regulation. In fact, REA and its predecessor companies have been regulated by the Interstate Commerce Commission since the Hepburn Act in 1906. The acquisition of a stock interest in REA by Greyhound—or by anyone else, for that matter—can have no effect whatever upon the regulatory provisions applicable to REA. If the freight forwarders have a complaint about the structure of the Interstate Commerce Act and its provisions applicable to express companies, they must address that complaint to Congress. They certainly should not be permitted to introduce such an issue into a proceeding under Section 20a. The truckers make no showing in their petition of any injury to be suffered by them if the proposed stock issue should be granted.

The remaining petition has been filed by the Justice Department in a unique attempt to expand this 20a proceeding into a most novel proceeding involving Section 7 of the Clayton Act. This petition, like those filed by bus company [fol. 209] competitors of Greyhound and by the freight forwarders, requests the Commission to anticipate whatever questions might be raised by a possible consolidation of certain operating functions and facilities of REA and Greyhound. Disregarding the fact that REA's competitive posture is such that its possible bankruptcy and liquidation were discussed before the Commission and in the press as recently as four years ago, these petitioners claim that any such consolidation might result in injuring competition. Thus, the forwarders allege that REA would become a freight forwarder; the bus companies allege no bus company could compete with an "amalgamation" of REA and Greyhound and claim that the issue in this 20a and 214 proceeding is really "whether Greyhound should be allowed

to consolidate its facilities and operations with those of REA"; Trailways claims that granting REA's application will allow Greyhound to "acquire" REA and become a monopoly; and the Justice Department alleges that the proposed stock issue may in itself violate Section 7 of the Clayton Act.

But the matter of approval of issuance of securities by carriers has been committed exclusively by Congress to the Commission. There certainly can be no basis for asserting that the mere issuance by REA of the stock which is the subject—and the only subject—of this proceeding will tend to lessen competition. As to the future, it is true that REA and Greyhound *may* make a study of, and possibly effect, [fol. 210] certain economies. As the resolution adopted by the Board of Directors of REA states, however, this is only an "intention" and even this "intention" is conditioned in the resolution on such economies being "lawful". The purchase by Greyhound of a $10,000,000 interest in REA cannot in itself be a violation of Section 7 of the Clayton Act. If any "economies" are made in the future which the Justice Department feels may be "unlawful", the Department has an adequate forum at that time to challenge them. Certainly the mere expression of an intention to consider "lawful" economies in the future coupled with the purchase of a minority non-controlling interest in REA cannot be said to be factors necessitating the Commission to assume the novel position of conducting an antitrust proceeding.

REA's interest in this transaction is to acquire urgently needed capital by the sale of its shares—a sale which is not conditioned upon any other agreement being reached with Greyhound or upon Greyhound obtaining any control of or power to control REA. This interest should be protected by the Commission and not be turned aside by an investigation and hearing on such conjectural factors as have been submitted by the Justice Department. The interest of the Justice Department is to insure that competitors of REA or Greyhound will not be harmed. Both

[fol. 211] the interests of REA and the interests of the Justice Department can be fully served and protected if, *and only if,* the issues presented are taken up *at the proper time and in logical order of sequence.* There is every reason why the Commission should protect the interests of REA by authorizing the sale of REA stock to Greyhound promptly and without any further proceedings. There is no reason why the interests of the Justice Department—and any other competitors—cannot fully be protected at the time any consolidation or economies thought to be unlawful are proposed to be put into effect.

2. *The present application does not raise an issue of "control" under Section 5.*

Certain of the petitioners claim that the proposed issue may give Greyhound "control" of, or the "power to control," REA within the meaning of Section 5 of the Interstate Commerce Act. REA submits that the documents filed with the Commission by REA establish that the proposed stock issue will not give Greyhound such control or power to control. The fact is that Greyhound's five directors on the REA Board will face 18 railroad directors (divided into three voting blocs, each having at least as many votes as Greyhound) who will have the power to prevent any action proposed by Greyhound. In light of such facts, the contention that the proposed stock issue will give Greyhound control of, or the power to control, REA must be dismissed as frivolous.

[fol. 212] It is asserted by certain of the petitioners that the offer which Greyhound has agreed to make to buy up to an additional 1,000,000 shares from REA stockholders raises an issue of control which the Commission must consider at this time. For example, the petitions of the dissenting stockholders all allege that REA's application discloses that Greyhound "will also have the right to purchase up to 1,000,000 shares of the common stock of REA

from present stockholders".* Greyhound does not and will not have the *right* to purchase *any* stock from REA stockholders; Greyhound has agreed to accept tenders of up to 1,000,000 shares from REA stockholders, subject to the right of first refusal in other stockholders and to all necessary government approvals. In fact, the railroad stockholders filing such petitions have it in their power to prevent Greyhound from purchasing any stock from REA stockholders and the representatives of certain railroad stockholders have repeatedly stated their intention to do so. Whether additional purchases of REA stock by Greyhound (or by anyone else, including REA's railroad stockholders) [fol. 213] will in the future give the purchaser control of REA is a question not properly now before the Commission.** That question is premature at this time and the Commission ought not to be drawn into a consideration of such conjectural issues.

In addition, there is a rather curious attempt by the freight forwarders to use an allegation of "control" to re-examine the Standard Express Operations Agreement approved in *Express Contract, 1959* (Docket No. 33140). The petition states that all the Commission approved in that Docket was the pooling aspects posed by the Express Contract—which, of course, is true because that is all the Commission had jurisdiction of under Section 5 of the Act. This allegation, like all others bottomed on the "control"

* That statement is misleading, to say the least. Some other misleading assertions in the petitions are (a) the statement in the bus companies' petition that Greyhound may have a right of first refusal on REA stock, which is not true and was never contemplated by anyone, and (b) the allegations in the freight forwarders' petition that some kind of promises may exist which would eliminate the right of first refusal, which is not true and is denied by REA and Greyhound in the documents already filed herein.

** REA wishes to re-emphasize that Greyhound has notified the Commission that if Greyhound should subsequently acquire any additional stock interest which would even approach a position of control, Greyhound would file an appropriate application under Section 5 of the Interstate Commerce Act.

issue, is premature at this time and ought not to be allowed to confuse this 20a and 214 proceeding.

3. *No formal hearing is necessary.*

All opposing petitioners request that the Commission set a hearing to consider the approval of the proposed issue and also to consider all the other issues raised in such petitions. REA submits that there is no need for such a [fol. 214] hearing because the only issue before the Commission—the 20a and 214 issue—should be decided by the Commission on the basis of the documents submitted by REA. Such documents contain all the information in the possession of REA relating to this proceeding and a hearing could not develop any information pertinent to REA's application not now known to the Commission.

REA submits that it needs badly the $10,000,000 proceeds of the proposed stock issue and should not be compelled to await the termination of a protracted hearing on extraneous issues before receiving such proceeds.

Wherefore, the applicant prays that the Commission

(1) deny all protests and petitions filed in opposition to the application and

(2) enter an order under Sections 20a and 214 of the Interstate Commerce Act authorizing the proposed issue as described in the application.

Dated this 16th day of November, 1964.

William J. Taylor, Alan F. Doniger, Joel H. Gross, Henry P. Riordan, Counsel for Applicant Railway Express Agency, Incorporated.

[fol. 215] Certificate of Service (omitted in printing).

[fol. 216] Service Date: December 8, 1964

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED—STOCK ISSUANCE

In the Matter of Petitions for Leave to Intervene.

Present: Kenneth H. Tuggle, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

ORDER—December 2, 1964

Upon consideration of the record in the above-entitled proceeding and petitions for leave to intervene on behalf of the parties listed in the appendix attached hereto, reply of applicant thereto, and good cause appearing:

It is ordered, That said petitioners be, and they are hereby, permitted to intervene in this proceeding.

Dated at Washington, D. C., this 2nd day of December, A. D., 1964.

By the Commission, Commissioner Tuggle.

Harold D. McCoy, Secretary.

(Seal)

[fol. 217] APPENDIX

1. Freight Forwarders Institute, filed October 20, 1964
2. Southern Pacific Company, filed October 20, 1964
3. National Trailways Bus System, filed October 22, 1964
4. Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Bayshore Buslines, Inc., Continental Bus System, Inc., Continental Crescent Lines, Inc., Continental Panhandle Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Inc., Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Bus Lines, Inc., and Muscatine, Davenport and Clinton Bus Company, filed October 22, 1964
5. The Atchison, Topeka and Santa Fe Railway Company, filed October 22, 1964
6. The Denver and Rio Grande Western Railroad Company, filed October 22, 1964
7. St. Louis Southwestern Railway Company and St. Louis Southwestern Railway Company of Texas, filed October 28, 1964
8. Missouri Pacific Railroad Company, filed November 2, 1964
9. American Trucking Associations, Inc., and Regular Common Carrier Conference, filed November 9, 1964
10. The Greyhound Corporation, filed November 9, 1964

[fol. 218] [File endorsement omitted]

[fol. 219]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITIONS FOR LEAVE TO INTERVENE—Filed January 21, 1965

Come now Denver Chicago Trucking Company, Inc.; Consolidated Freightways Corporation of Delaware and Missouri Consolidated Freightways Corporation; Illinois-California Express, Inc.; Navajo Freight Lines, Inc.; Pacific Intermountain Express Co.; Transcon Lines, in its own right and as operator of Indianapolis-Kansas City Motor Express Co. and Decatur Seaway Motor Express, Inc.; Watson-Wilson Transportation System, Inc.; Ringsby Truck Lines, Inc.; Western Gillette, Inc.; Interstate Motor Lines, Inc.; T.I.M.E. Freight, Inc.; and Consolidated Copperstate Lines, and pray leave to intervene in all further proceedings for disposition of the pending application. For cause thereof, petitioners show that:

I.

Each of petitioners is a motor common carrier of general commodities operating under certificates issued by this Commission as more fully set forth in Appendix A hereto. In providing service under its certificates each petitioner competes with Railway Express Agency, Inc. (REA).

[fol. 220] II.

The import of the program to expand the area and intensity of its competition with motor common carriers on

a nationwide basis was not fully or immediately apparent when notice of REA's proposed stock issue was published on October 24, 1964 and a period of 15 days was allowed by the Commission for filing protests. A brief ten days before, on October 14th, REA had filed a Petition seeking modification or elimination of the rail-haul restrictions presently applicable to its motor carrier certificates. As Exhibit 3 of that Petition reveals, elimination of REA's rail-haul restrictions would permit REA to tie together previously separate routes into a vast network of unrestricted motor carrier authority and to provide all-highway services in direct competition with these petitioning carriers. The Commission's rule making proceeding to define *Express Company Terminal Areas—Ex Parte No. 242,* was in the midst of hearings, and REA was there seeking the unfettered right to designate terminal areas as broad as it chooses and thus further extend the scope of its all-highway competition. However, it was only with the serving of the Commission's decision in *Freight, All Kinds, L.C.L. Container Charges*—U.S.A. 323, I.C.C. 468, on November 12, 1964, after the time for filing all protests in Finance Docket No. 23324 had expired, that the enormity of the threatened competitive impact of the REA program was fully revealed. That decision appears to leave REA free to compete for virtually all of the general commodity traffic of these petitioning carriers, without limitation as to size of shipments, expedition, premium rates or special handling requirements.

[fol. 221] As REA's program has unfolded, the issuance of 500,000 shares of REA stock for sale to The Greyhound Corporation (Greyhound), as the first step in a plan looking toward ultimate acquisition by Greyhound of a controlling interest in REA, has become a matter of the gravest importance and competitive significance to these petitioning carriers. Assessment of the true significance of the REA program and the filing of a protest within the brief time period allowed was not possible even if the Federal

Register publication had contained sufficient facts to apprise interested parties of the true nature and import of the REA's proposal to issue securities to Greyhound and the Commission's decision in *Freight, All Kinds, supra*, had been rendered. Rule 1.40 of the General Rules of Practice provides, however, that "failure to file a protest shall not prejudice subsequent participation in the proceeding."

III.

We urge the Commission to set the REA proposal for hearing in view of its vast importance to these petitioning carriers and the transportation industry. Participation by the petitioners will not unduly broaden the issues since their position will be essentially one of support for the position in opposition already taken by American Trucking Associations, Inc., and Regular Route Common Carrier Conference. These petitioning carriers are also seeking to intervene in proceedings involving REA's petition to remove its rail-haul restrictions in *MC 68562 et al.*, and in *Ex Parte 242*, in order to protect their interests in those aspects of REA's total program. These carriers are peculiarly threatened by REA's program of expanded com-
[fol. 222] petition in the freight field and are directly threatened by any step which leads to the ultimate control of REA by Greyhound with its vast financial resources and capability for bolstering REA's competitive potentials by making available its own nationwide operating facilities for express service. They believe that a significant stock interest in or control over REA by Greyhound is neither compatible nor consistent with the public interest.

These petitioners by participating in further procedures involving the disposition of this proceeding can aid in the development of a record that will permit the Commission to judge the true impact of the REA proposal on national transportation policy and to determine whether this pro-

posed security issue meets the public interest standards of section 20a, or 5(3) of the Act.

Wherefore, your petitioners pray that they will be permitted to intervene in this proceeding in opposition and participate in all further stages of the proceeding.

Respectfully submitted,

David Axelrod, 39 South La Salle Street, Chicago, Illinois 60603;

Eugene T. Liipfert, 1035 Universal Building North, Washington, D. C. 20009;

Attorneys for Petitioners.

Of Counsel: Axelrod, Goodman & Steiner, 39 South La Salle Street, Chicago, Illinois 60603, Telephone CEntral 6-9375.

Dated: January 19, 1965.

[fol. 223] Certificate of Service (omitted in printing).

[fol. 224] APPENDIX A TO PETITION

I.

Denver Chicago Trucking Company, Inc. is a motor common carrier of general commodities operating under certificates issued in Docket No, MC 29988 and subnumbers in the States of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wyoming, for the most part over regular routes.

II.

Consolidated Freightways Corporation of Delaware is a motor common carrier of general commodities, operating under certificates issued in Docket No. MC 42487 and subnumbers in the States of Alaska, Arizona, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, Wisconsin and Wyoming and in the District of Columbia, for the most part over regular routes. Missouri Consolidated Freightways Corporation is a motor common carrier of general commodities operating under certificates issued in Docket No. 52746 and subnumbers in the States of Colorado, Illinois, Indiana, Iowa, Kansas and Missouri, for the most part over regular routes.

[fol. 225]

III.

Illinois-California Express, Inc. is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 48958 and subnumbers in the States of Arizona, California, Colorado, Illinois, Indiana, Iowa, Nebraska, New Mexico, Oklahoma, Texas and Wyoming, for the most part over regular routes.

IV.

Navajo Freight Lines, Inc. is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 76032 and subnumbers in the States of Arizona, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, New York, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah and Wisconsin, and the District of Columbia, for the most part over regular routes.

V.

Pacific Intermountain Express Co. is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 730 and subnumbers in the States of California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, Oregon, Utah, Washington and Wyoming, for the most part over regular routes.

[fol. 226]

VI.

Transcon Lines is a motor carrier of general commodities operating under certificates issued in Docket No. MC 110325 and subnumbers in the States of Alabama, Arizona, Arkansas, California, Georgia, Illinois, Indiana, Kansas, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee and Texas, for the most part over regular routes. Transcon Lines is operator of Indianapolis-Kansas City Motor Express Co., a motor carrier of general commodities authorized under certificates in Docket No. MC 107511 and subnumbers to serve points in the States of Illinois, Indiana, Kansas, Missouri and Virginia over regular routes, and of Decatur Seaway Motor Express, Inc., a motor common carrier of general commodities authorized under certificates in Docket No. MC 68909 and subnumbers to serve points in the States of Illinois, Indiana, Missouri and Ohio over regular routes.

VII.

Watson-Wilson Transportation System, Inc. is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 70451 and subnumbers in the States of Arizona, California, Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, South Carolina, Tennessee and Wyoming, for the most part over regular routes.

[fol. 227] VIII.

Ringsby Truck Lines, Inc. is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 52709 and subnumbers in the States of California, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Nevada, Oregon, Utah, Washington and Wyoming, for the most part over regular routes.

IX.

Western Gillette, Inc. is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 8948 and subnumbers in the States of Arizona, Arkansas, California, Illinois, Indiana, Kansas, Missouri, Nevada, New Mexico, Oklahoma, Tennessee and Texas, for the most part over regular routes.

X.

Interstate Motor Lines, Inc. is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 33641 and subnumbers in the States of California, Colorado, Idaho, Illinois, Iowa, Kansas, Missouri, Nebraska, Nevada, Oregon, Utah and Wyoming, for the most part over regular routes.

XI.

T.I.M.E. Freight, Inc. is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 35320 and subnumbers, in the States of Alabama, Arizona, Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Missouri, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, and Virginia, and the District of Columbia, for the most part over regular routes.

[fol. 228] XII.

Consolidated Copperstate Lines is a motor common carrier of general commodities operating under certificates issued in Docket No. MC 22167 and subnumbers in the States of Arizona, California, Louisiana, Oregon, Texas and Utah, for the most part over regular routes:

* * * * * * *

[fol. 229] Service Date: February 17, 1965

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED—STOCK ISSUANCE

In the Matter of Petition for Leave to Intervene.

Present: Kenneth H. Tuggle, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

ORDER—February 5, 1965

Upon consideration of the record in the above-entitled proceeding and petition for leave to intervene on behalf of Denver Chicago Trucking Company, Inc., Consolidated Freightways Corporation of Delaware and Missouri Consolidated Freightways Corporation, Illinois-California Express, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Transcon Lines, in its own right and as operator of Indianapolis-Kansas City Motor Express Co. and Decatur Seaway Motor Express, Inc., Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., Western Gillette, Inc., Interstate Motor Lines, Inc., T.I.M.E.

Freight, Inc., and Consolidated Copperstate Lines; and good cause appearing:

It is ordered, That said petitioners be, and they are hereby, permitted to intervene in this proceeding.

Dated at Washington, D. C., this 5th day of February, A. D., 1965.

By the Commission, Commissioner Tuggle.

Bertha F. Armes, Acting Secretary.

(Seal)

[fol. 230] Secretary's Certificate to following transcript (omitted in printing).

[fol. 231]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23374

SOUTHERN PACIFIC COMPANY, a corporation, Complainant,

vs.

THE GREYHOUND CORPORATION, a corporation, and RAILWAY EXPRESS AGENCY, INCORPORATED, a corporation, Defendants.

COMPLAINT—Filed November 3, 1964

The complaint of the above-named complainant invokes the exercise of the authority of the Commission under section 5(7) of the Interstate Commerce Act and respectfully shows:

I

Complainant is a Delaware corporation and is a common carrier by railroad in interstate commerce in the states of Arizona, California, Louisiana, Nevada, New Mexico, Oregon, Texas and Utah, having its principal place of business at San Francisco, California.

II

Defendant The Greyhound Corporation (hereinafter referred to at times as Greyhound) is a corporation, having its principal place of business at 140 South Dearborn St., Chicago, Illinois.

III

Greyhound is a common carrier by express and motor [fol. 232] vehicle or controls common carriers by express and motor vehicle engaged in the transportation of property and passengers between points in all states of the United States except Alaska and Hawaii and, as such, Greyhound is subject to the provisions of the Interstate Commerce Act.

IV

Defendant Railway Express Agency, Incorporated (hereinafter referred to as R E A), is a Delaware corporation, having its principal place of business at 219 East 42nd St., New York 17, New York. R E A is authorized to issue 2,576,000 shares of common stock, of which 1,999,188 shares have been duly issued and are outstanding. Complainant is the owner of 95,496 of said duly issued shares of stock.

V

R E A is a common carrier by express on railroads and a common carrier by motor vehicle engaged in the transportation of property between points in all states of the United States and, as such, R E A is subject to the provisions of the Interstate Commerce Act.

VI

Greyhound and R E A are competitors for the transportation of property between points in all states of the United States except Alaska and Hawaii.

VII

R E A filed with this Commission, on October 7, 1964, an application, assigned Finance Docket No. 23324, seeking authority under sections 20a and 214 of the Interstate Commerce Act to issue 500,000 shares of its unissued stock, [fol. 233] said stock to be sold to Greyhound at the price of $20 per share, upon the following terms and conditions:

(a) The R E A By-Laws will be amended so that The Greyhound Corporation shall be permitted to name 20% of the R E A Board of Directors.

(b) The R E A Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,637,054 of outstanding 5% notes, issued originally to R E A's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.

(c) The R E A Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between R E A and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage.

(d) The R E A Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some R E A stock to airlines and/or the general public if and when conditions appear favorable to the best interests of R E A as a company.

(e) The Greyhound Corporation shall offer to purchase up to 1,000,000 shares of the common stock of

R E A from present shareholders at a price of $20 per share cash. Such offer to purchase will remain open and in full force and effect for a period of sixty days following the closing date of the transaction involving the 500,000 authorized unissued shares of R E A.

(f) The offer of R E A shall expire at 12:00 Noon on December 31, 1964.

(g) The offer of R E A may be accepted immediately, subject to all necessary authorizations from the Interstate Commerce Commission and to approval by the shareholders of this corporation of (i) the issuance to The Greyhound Corporation pursuant to said offer of 500,000 shares of authorized but unissued common stock of this corporation and (ii) the amendments to the By-Laws of this corporation required by subparagraph (a) of said offer.

VIII

The proposed transaction as set forth in paragraph VII [fol. 234] hereof encompasses the acquisition by Greyhound of control or management of R E A or of the power to exercise control or management of R E A.

IX.

The proposed transaction as set forth in paragraph VII hereof is within the scope of subparagraph (a)(i) of paragraph (2) of section 5 of the Interstate Commerce Act and is declared unlawful by paragraph (4) of said section 5 unless an application is presented to and authority secured from the Commission pursuant to subparagraph (b) of paragraph (2) of said section 5. No such application has been presented by Greyhound to the Commission, and the proposed transaction is unlawful.

Wherefore, complainant prays that defendants be required to answer the charges herein; that after due notice, hearing, and investigation by the Commission, pursuant to

its powers under paragraph (7) of section 5 of the Interstate Commerce Act, an order be made commanding said defendants to cease and desist from consummating the proposed transaction as set forth in paragraph VII hereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at San Francisco, Calif., October 30, 1964.

Charles W. Burkett, W. Harney Wilson, Eugene Garfinkle, Thormund A. Miller, By Charles W. Burkett, Attorneys for Complainant.

[fol. 235]

Service Date
November 13, 1964

F. D. No. 23374 TM:CAR

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

November 13, 1964

Finance Docket No. 23374

SOUTHERN PACIFIC COMPANY,

v.

THE GREYHOUND CORPORATION, et al.

Notice to Defendants:

Herewith is a copy of a complaint filed with the Interstate Commerce Commission in the above-entitled case.

Defendants are hereby called upon to satisfy the complaint or to answer the same in writing within twenty days from this date.

By the Commission.

Harold D. McCoy, Secretary.

Copy to: Charles W. Burkett, Southern Pacific Company, 65 Market St., San Francisco, Calif. 94105.

A copy of the above-entitled notice and complaint sent to the following by regular mail on November 13, 1964: (7)

[fol. 236] *Raymond G. Cox, Illinois Commerce Commn., Rm. 202, Ill. State Office Bldg., Springfield, Ill.

The Greyhound Corporation, 140 S. Dearborn St., Chicago 3, Ill.

*Samuel R. Madison, P.S.C.—State of New York, 55 Elk St., Albany 1, N. Y.

Railway Express Agency, Inc.—defendant: serve on Wash. agent—MBG.

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* Complaint Only

[fol. 237]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23374

[Title omitted]

ANSWER OF RAILWAY EXPRESS AGENCY, INCORPORATED—
Filed December 2, 1964

For its answer to the complaint herein, Railway Express Agency, Incorporated (REA) respectfully states as follows:

1. On information and belief, admits the averments of Paragraphs I and II thereof.

2. On information and belief, denies the averments of Paragraph III thereof and refers to the Commission's decision in Docket No. MC-F-8531 and Finance Docket No. 22739 where the correct status of The Greyhound Corporation (Greyhound) is set forth.

3. Admits the averments of Paragraphs IV and V thereof.

4. Denies the averments of Paragraph VI thereof, except admits that Greyhound and REA are competitors in a [fol. 238] limited sense for the transportation of property between certain points in all states of the United States, except Alaska and Hawaii, and, in this respect, REA alleges that Greyhound is limited in its competition with REA in that Greyhound can only transport property on its passenger vehicles and that as a result there is a limitation upon the size, weight, volume and character of property which it can transport. REA further alleges that in the transportation of small shipments in the United States Greyhound handles substantially less than 1% of the total, REA handles approximately 2% of the total, and the remaining 97+% is handled by the truckers, freight forwarders, railroads and the United States Post Office through its parcel post, so that presently the competition between REA and Greyhound for the transportation of small shipments is nominal and in the aggregate the volume of small shipments transported by both REA and Greyhound is also nominal.

5. Admits the averments of Paragraph VII thereof.

6. Denies each and every averment of Paragraphs VIII and IX thereof and further respectfully refers the Commission to the pleadings and other documents filed by REA in Finance Docket No. 23324.

Affirmative Defense

As and for an affirmative defense to the complaint herein, REA alleges that the complaint itself shows that no stock [fol. 239] interest or other interest in REA has yet been obtained by Greyhound. Accordingly, no complaint will lie under the provisions of paragraph (7) of Section 5 of the Interstate Commerce Act which authorizes the Commission to investigate and determine whether any person "is violating" the provisions of Section 5(4).

Wherefore, defendant REA prays that the complaint herein be dismissed on the grounds (a) that the Commission lacks jurisdiction of the subject matter of the complaint, (b) that the complaint totally fails to set forth any factual justification for the conclusory allegations contained therein, and (c) that the pleadings and other documents filed by REA in Finance Docket No. 23324 conclusively demonstrate that the allegations of the complaint are premature and completely without factual support therefor, and defendant REA further prays that it be granted such other and further relief as to the Commission may seem proper.

December 1, 1964.

William J. Taylor, Alan F. Doniger, Joel H. Gross, Henry P. Riordan, Attorneys for Defendant, Railway Express Agency, Incorporated.

[fol. 240] Certificate of Service (omitted in printing).

[fol. 241]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23374

[Title omitted]

MOTION OF DEFENDANT RAILWAY EXPRESS AGENCY, INCORPORATED TO DISMISS COMPLAINT—Filed December 2, 1964

Railway Express Agency, Incorporated (REA), one of the defendants above named, moves the Interstate Commerce Commission (the Commission) to dismiss the complaint herein because of lack of legal sufficiency appearing on the face of such complaint and, in support of said motion, alleges as follows:

1. Paragraph VIII of the complaint alleges that "The proposed transaction as set forth in paragraph VII hereof" encompasses the acquisition by The Greyhound Corporation (Greyhound) of control or management of REA or of the power to exercise control or management of REA. [fol. 242] Paragraph IX of the complaint alleges that said "proposed transaction" is within the scope of Section 5(2)(a)(i) of the Interstate Commerce Act and is declared unlawful by Section 5(4) unless an application is presented to and authority secured from the Commission pursuant to Section 5(2)(b).

2. The complaint thus shows on the face thereof that it is directed against a proposed transaction and not against an existing transaction.

3. Section 5(7) authorizes the Commission to investigate and determine "whether any person is violating the provisions of paragraph (4)" of Section 5. Paragraph (4) of said Section 5 provides as follows:

> "(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transac-

tion within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

4. The Commission is not authorized under Section 5(7) to investigate and determine whether a *proposed transaction* will violate the provisions of Paragraph (4) of Section 5. The complaint herein, which prays that the Com- [fol. 243] mission investigate a proposed transaction, thus shows on its face the lack of legal sufficiency thereof.

Wherefore, defendant REA prays that the complaint herein be dismissed by the Commission because of lack of legal sufficiency appearing on the face of such complaint.

December 1, 1964

William J. Taylor, Alan F. Doniger, Joel H. Gross, Henry P. Riordan, Attorneys for Defendant, Railway Express Agency, Incorporated.

[fol. 244] Certificate of Service (omitted in printing).

[fol. 245] [File endorsement omitted]

[fol. 246]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23374

[Title omitted]

ANSWER OF THE GREYHOUND CORPORATION—
Filed December 3, 1964

Comes Now The Greyhound Corporation, a Delaware corporation, one of the defendants above named, and answers the complaint of the Southern Pacific Company as follows:

I

Answering the allegations of Paragraph I of said complaint, this defendant admits the allegations of said paragraph.

II

Answering the allegations of Paragraph II of said complaint, this defendant admits the allegations of said paragraph.

[fol. 247]

III

Answering the allegations of Paragraph III of said complaint, this defendant denies said allegations, and in this behalf, this defendant refers to this Commission's decision in Docket No. MC-F-8531 and Finance Docket No. 22739 where the correct status of this defendant is set forth.

IV

Answering the allegations of Paragraph IV of said complaint, this defendant admits the allegations of said paragraph.

V

Answering the allegations of Paragraph V of said complaint, this defendant admits the allegations of said paragraph.

VI

Answering the allegations of Paragraph VI of said complaint, this defendant admits that it and R E A are competitors in a limited sense for the transportation of property between certain points in the United States, and in this behalf, this defendant alleges that it is limited in its competition with R E A in that this defendant can only transport property on its passenger vehicles and that as a result there is a limitation upon the size, weight, volume, [fol. 248] and character of property which it can transport. This defendant further alleges that in the transportation of small shipments in the United States it handles substantially less than 1% of the total, R E A handles approximately 2% of the total, and the remaining 97+% is handled by the truckers, freight forwarders, railroads, and the United States Post Office through its parcel post, so that presently the competition between R E A and defendant for the transportation of small shipments is nominal and in the aggregate the volume of small shipments transported by by both R E A and defendant is also nominal.

VII

Answering the allegations of Paragraph VII of said complaint, this defendant admits the allegations of said paragraph.

VIII

Answering the allegations of Paragraph VIII of said complaint, this defendant denies said allegations.

IX

Answering the allegations of Paragraph IX of said complaint, this defendant admits that no application has been

presented by it to the Commission under Section 5 of the Interstate Commerce Act and, except as so admitted, this [fol. 249] defendant denies each and every allegation of said Paragraph IX.

First Affirmative Defense

As and for a first affirmative defense to said complaint and each and every part thereof, this defendant alleges that no stock interest or other interest in R E A has yet been obtained by it and that accordingly no complaint will lie under the provisions of paragraph (7) of Section 5 of the Interstate Commerce Act which provides for a complaint and investigatory proceeding where there is an existing violation of Section 5.

Wherefore, this defendant prays that complainant take nothing by its said complaint.

Dated at San Francisco, California, this 1st day of December, 1964.

The Greyhound Corporation, By Gerald H. Trautman, Vice President.

Robert J. Bernard, The Greyhound Corporation, 140 South Dearborn Street, Chicago, Illinois 60603.

Gerald H. Trautman, The Greyhound Corporation, 601 California Street, San Francisco, California 94108.

Attorneys for Defendant, The Greyhound Corporation.

[fol. 250] Certificate of Service (omitted in printing).

[fol. 251]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23374

[Title omitted]

MOTION TO DISMISS COMPLAINT—December 3, 1964

Comes Now The Greyhound Corporation, one of the defendants above named, and moves the Commission to dismiss the complaint herein and in support of said motion alleges as follows:

1. The complaint purports to be filed under paragraph (7) of Section 5 of the Interstate Commerce Act. This paragraph authorizes the Commission "to investigate and determine whether any person is violating the provisions of paragraph (4)." Paragraph (4) in turn in effect makes it unlawful to control a carrier without Commission approval, so that it is plain that paragraph (7) read in con-
[fol. 252] junction with paragraph (4) is directed to circumstances where there may be an *existing* unlawful control.

2. The complaint shows on its face that there is no possibility of an *existing* unlawful control of Railway Express Agency, Incorporated ("R E A") by The Greyhound Corporation ("Greyhound"). It is based on a *prospective* transaction between R E A and Greyhound. This transaction, as the complaint shows, is pending before the Commission in Finance Docket No. 23324. Until the Commission acts in that docket to authorize the issuance of 500,000 shares of R E A stock to Greyhound, Greyhound will have no interest of any character in R E A. Accordingly, Greyhound could not possibly be in violation of the provisions of paragraph (4) of Section 5 of the Act and, therefore, there is nothing for the Commission to investigate under the provisions of paragraph (7) of Section 5.

3. The complainant is attempting to prostitute the provisions of paragraph (7) into an injunctive procedure addressed to what it conceives to be a *prospective* violation of paragraph (4). It prays in its complaint that "an order be made commanding said defendants to cease and desist from consummating the proposed transaction." But the Commission is given no such power by the provisions of paragraph (7). That paragraph further provides: "If the Commission finds after such investigation that such person [fol. 253] *is violating* the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, *to prevent continuance of such violation.*" (Emphasis supplied.) The complaint does not ask the Commission to find that Greyhound "is violating" paragraph (4) because, as the complaint shows on its face, Greyhound is not. Accordingly, the Commission could not exercise its jurisdiction to order Greyhound to take any action "to prevent continuance of such violation."

Wherefore, defendant The Greyhound Corporation prays that the complaint be dismissed by the Commission.

Dated at San Francisco, California, this 1st day of December, 1964.

Respectfully submitted,

The Greyhound Corporation, By Gerald H. Trautman, Vice President.

Robert J. Bernard, The Greyhound Corporation, 140 South Dearborn Street, Chicago, Illinois 60603;

Gerald H. Trautman, The Greyhound Corporation, 601 California Street, San Francisco, California 94108;

Attorneys for Defendant The Greyhound Corporation.

[fol. 254]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23374

[Title omitted]

REPLY OF COMPLAINANT TO MOTIONS OF DEFENDANTS TO DISMISS—Filed December 21, 1964

This reply is directed at the motion to dismiss filed in this proceeding by defendant The Greyhound Corporation ("Greyhound") and the motion to dismiss filed by defendant Railway Express, Incorporated. The sole ground advanced in support of these two motions is the contention that the Commission has no jurisdiction to prevent a party from entering into a transaction made unlawful by paragraph (4) of section 5 of the Interstate Commerce Act and that its jurisdiction is limited to requiring a person to withdraw from such a transaction only after it has been consummated.

[fol. 255] Defendants' contention is completely lacking in merit, as can be seen by merely examining the language of the applicable statute. Paragraph (7) of section 5 of the Interstate Commerce Act authorizes the Commission "to investigate and determine whether any person is violating the provisions of paragraph (4)". Paragraph (4) makes unlawful two distinct acts: (1) the acquisition of unauthorized control, and (2) the continuance of the maintenance of unauthorized control after it has been acquired. The first sentence of paragraph (4) refers to the *first* of these acts in stating: "It shall be unlawful" to "enter into any transaction within the scope of" paragraph 5(2)(a), "or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management" without authority. The second sentence of paragraph (4) refers to the *second* of these acts in stating: "It shall be

unlawful to continue to maintain control or management accomplished or effectuated."

Therefore, the Commission's power under paragraph (7) is directed to investigating and determining whether any person is violating the provisions of paragraph (4) by *either* (1) engaging in the process of acquiring unauthorized control *or* (2) continuing to maintain such control after it has been acquired. So, also, the Commission's power to issue an order is "to prevent continuance of such violation", i.e., either the violation of acquiring the control [fol. 256] or the violation of continuing to maintain such control.

The motions to dismiss are devoid of merit and should be summarily denied.

Respectfully submitted,

Charles W. Burkett, W. Harney Wilson, Eugene Garfinkle, Thormund A. Miller, Attorneys for Complainant.

[fol. 257] Certificate of Service (omitted in printing)

[fol. 258] Secretary's Certificate to following transcript (omitted in printing).

[fol. 259]

Service Date:
March 16, 1965

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 15th day of March, A. D. 1965.

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK.

Finance Docket No. 23374

SOUTHERN PACIFIC CO.

v.

GREYHOUND CORP. and RAILWAY EXPRESS AGENCY, INC.

ORDER—March 15, 1965

It appearing, That Railway Express Agency, Incorporated, by an application filed October 7, 1964, in Finance Docket No. 23324, as last supplemented November 17, 1964, seeks authority under sections 20a and 214 of the Interstate Commerce Act to issue 500,000 shares of common stock, par value $1 per share, to be sold to The Greyhound Corporation (Greyhound) at a price of $20 per share; that interested parties listed in the appendix hereto have been permitted to intervene; and that Finance Board No. 2 has certified the application to us for determination;

It further appearing, That the several companies named in section II(b) of the appendix have filed a petition seeking an order requiring Greyhound to file an application under section 5 of the act, and requesting consolidation and

hearing of such application on a common record with the application for authority to issue said stock;

It further appearing, That the United States Department of Justice has filed a petition for leave to intervene and for consolidation of the application to issue securities with a proceeding to determine the lawfulness of the proposed transaction under section 7 of the Clayton Act, and for oral hearing and a prehearing conference for the purpose of formulating the issue;

It further appearing, That by complaint, served November 13, 1964, in Finance Docket No. 23374, Southern Pacific Company requests us to invoke the provisions of section 5(7) of the act, and after hearing and investigation, to require applicant and Greyhound to cease and desist from consummating the proposed transaction; that by motions filed December 2 and 3, 1964, defendants seek dismissal of the complaint; and that defendants have answered the complaint, and complainant has replied to the motions;

It further appearing, That applicant has replied to all protests and petitions, urging primarily that the application be approved without further proceedings;

It further appearing, That the filing of an application under section 5 of the act is permissive and may not be required by us, see *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122 (127); that an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time; and that a hearing is not necessary for a determination of the application for authority to issue said stock under the provisions of sections 20a and 214.

[fol. 260] It further appearing, That applicant's charter authorizes it to issue 2,576,000 shares of common stock, of which 1,999,188 shares are outstanding, owned by some 60 railroads; that said stock is not required to be held only

by railroad corporations; that outstanding shares are subject to a right of first refusal by railroad shareholders; and that the shares proposed to be issued to Greyhound will not be subject to such right;

It further appearing, That after the proposed sale to Greyhound of 500,000 shares of applicant's authorized but unissued common stock at $20 per share, Greyhound will offer to purchase from railroad shareholders of applicant up to 1,000,000 shares of outstanding common stock at the same price; and that to comply with terms and conditions of the offer, applicant's board of directors, at a meeting held September 1, 1964, adopted resolutions declaring intentions (a) to refinance, if necessary, $27,637,054 of outstanding 5-percent notes, issued originally to applicant's stockholders, or otherwise to secure waiver or cancellation of a prohibition against payment of dividends; (b) to consider seriously and work toward a long-term agreement between applicant and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage; and (c) to consider seriously at a later time the sale of some stock to airlines and/or the general public if and when conditions appear favorable to the best interests of applicant as a company;

It further appearing, That at a special meeting of applicant's stockholders held October 1, 1964, resolutions approving the proposed stock issue and amending applicant's by-laws to increase the membership of the board of directors from 23 to 25 and to increase the number of directors at large from 5 to 7, were adopted by a vote of 1,654,572 shares for and 269,880 shares opposed to the resolutions; that railroad stockholders have the right to nominate 18 members; that 7 may be nominated by railroads of the eastern district and 6 and 5 may be nominated by western and southern district railroads, respectively; that 5 of the 7 at-large directors may be nominated by bus company hold-

ers of at least 20 percent of the stock issued and outstanding; that an affirmative vote of two-thirds of the stock issued and outstanding is required to amend the by-laws in respect of the number of directors nominated by districts; and that for any alteration in the number of directors or in the method of nominating directors at large, the affirmative two-thirds vote shall include a majority of the issued and outstanding stock held by bus company stockholders as aforesaid;

It further appearing, That applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000;

[fol. 261] It further appearing, That interveners' opposition is directed to the possibility of control of applicant by Greyhound, through the purchase of the proposed stock issue or presently outstanding shares or otherwise, and to the anticipated combination and correlation of certain of their facilities and services;

It further appearing, That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors,

divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703 (714);

It further appearing, That if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition; and it appearing that Greyhound has acknowledged the requirements of section 5 in this regard and has stated that it will file a timely application; and that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5; and

It further appearing, and the said Division so finds, that the proposed issue by Railway Express Agency, Incorporated, of not exceeding 500,000 shares of common stock of the par value of $1 each, as aforesaid, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company and a common carrier by motor vehicle, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

It is ordered, That the United States Department of Justice be, and it is hereby, permitted to intervene.

It is further ordered, That in all other respects, the petitions of interveners for hearing and other proceedings be, and they are hereby, denied.

[fol. 262] It is further ordered, That the complaint in Finance Docket No. 23374 be, and it is hereby, dismissed.

It is further ordered, That Railway Express Agency, Incorporated, be, and it is hereby, authorized to issue not exceeding 500,000 shares of common stock of the par value of $1 each, to be sold to a non-railroad corporation at a price of not less than $20 per share.

It is further ordered, That this order shall become effective 35 days from the date it is served.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission.

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, respecting applications filed under sections 20a and 214 of the said act (49 CFR 56.6).

It is further ordered, That the applicant shall submit for the consideration of this Commission three copies of the journal entries required to record the transaction, and nothing herein is to be construed as approval of the proposed accounting; and

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States.

By the Commission, Division 3.

Bertha F. Armes, Acting Secretary.

(Seal)

[fol. 263]

F.D. No. 23324

APPENDIX

Parties permitted to intervene

I. In support of the application:

The Greyhound Corporation

II. In opposition to the application:

(a) Railroads of the western district, which own 269,880 shares of applicant's outstanding common stock

Southern Pacific Company, 95,496 shares
The Atchison, Topeka and Santa Fe Railway Company, 95,496 shares
The Denver and Rio Grande Western Railroad Company, 12,456 shares
St. Louis Southwestern Railway Company and St. Louis Southwestern Railway Company of Texas, each 4,152 shares
Missouri Pacific Railroad Company, 58,128 shares, of which 41,520 shares are owned directly and 16,608 shares are owned indirectly through its subsidiary, The Texas and Pacific Railway Company.

(b) National Trailways Bus System, an association, and several motorbus companies

Transcontinental Bus System, Inc.
American Buslines, Inc.
Arkansas Motor Coaches, Ltd., Inc.
Bayshore Buslines, Inc.
Continental Bus System, Inc.
Continental Crescent Lines, Inc.
Continental Panhandle Lines, Inc.
Continental Southern Lines, Inc.

Continental Tennessee Lines, Inc.
Denver-Colorado Springs-Pueblo Motorway
Denver-Salt Lake-Pacific Stages, Inc.
Continental Pacific Lines, Inc.
Midwest Buslines, Inc.
Smoky Mountain Stages, Inc.
Tennessee Trailways, Inc.
Union Bus Lines, Inc.
Muscatine, Davenport and Clinton Bus Company.

(c) American Trucking Associations, Inc., Regular Common Carrier Conference, and several trucking companies

Denver Chicago Trucking Company, Inc.
Consolidated Freightways Corporation of Delaware and Missouri Consolidated Freightways Corporation
Illinois-California Express, Inc.

[fol. 264]

Navajo Freight Lines, Inc.
Pacific Intermountain Express Co.
Transcon Lines, in its own right and as operator of Indianapolis-Kansas City Motor Express Co., and Decatur Seaway Motor Express, Inc.
Western Gillette, Inc.
Interstate Motor Lines, Inc.
T.I.M.E. Freight, Inc.
Consolidated Copperstate Lines

(d) Freight Forwarders Institute, representing freight forwarders.

[fol. 265]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 23324

[Title omitted]

PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND REGULAR COMMON CARRIER CONFERENCE TO STAY THE EFFECTIVE DATE OF DIVISION 3's ORDER—Filed April 2, 1965

Come now American Trucking Associations, Inc. (ATA), and Regular Common Carrier Conference (Conference), and file this petition asking the Commission to stay the effective date of Division 3's order, served March 16, 1965, and as grounds therefor state:

By application filed October 7, 1964, Railway Express Agency, Incorporated (Railway Express), seeks authority under sections 20a and 214 of the Interstate Commerce Act to issue 500,000 shares of common stock, par value $1 per share, to be sold to the Greyhound Corporation (Greyhound), at a price of $20 per share. ATA, Conference, 10 motor carriers, National Trailways Bus System, 17 motor bus companies, Freight Forwarder Institute, and 5 railroad stockholders of Railway Express filed petitions for leave to intervene in opposition to the application, and Greyhound filed a petition for leave to intervene in support of the application. A petition for leave to intervene was also filed by the Department of Justice, which requested the Commission to consolidate the application with a proceeding to determine the lawfulness of the proposed transaction under section 7 of the Clayton Act. Railway Express replied to the protests and petitions for leave to intervene [fol. 266] in opposition to its application. The Commission, however, granted all the petitions for leave to intervene.

In its March 16th order, Division 3 found that the proposed issuance by Railway Express of the 500,000 shares of common stock is for a lawful object within its corporate purposes and compatible with the public interest, will not impair its ability to perform service for the public as an express company and common carrier by motor vehicle, and is reasonably necessary and appropriate for such purpose. It rejected intervenors' arguments in opposition to the application, finding that a hearing was not appropriate at this time to investigate whether the proposed transaction might violate the provisions of section 5 or section 7 of the Clayton Act. Division 3 then went on to authorize Railway Express to issue the 500,000 shares of common stock and provided an effective date 35 days from the date of service. Thus unless the order is stayed, it would appear to give Railway Express and Greyhound authority to consummate the sale of the stock on April 20th.

Section 17(8) of the Interstate Commerce Act provides that where an application for reconsideration of an order of a division is made in accordance with section 17 and the rules and regulations of the Commission, and the order has not yet become effective, the order shall be stayed pending disposition of the matter by the Commission or appellate division. Petitioners are in the process of drafting a petition for reconsideration of Division 3's order pursuant to section 101 of the Commission's General Rules of Practice. It would appear that the filing of our petition on April 15 will automatically stay the order of Division 3. But, because there is no express rule in the General Rules of Practice which states that the order of a division is stayed upon the filing of a petition for reconsideration, we find it necessary to ask specifically that the Commission stay indefinitely the effectiveness of Division 3's order. [fol. 267] Should we be wrong in our interpretation of the effect of section 17(8), the Commission would have only five days within which to consider and to act upon our petition for reconsideration and any other petitions which may be filed. We submit that this is insufficient time to consider

properly this proposal, which is of such general transportation importance. Furthermore, unless an order is issued staying the effective date, there would be an outstanding order apparently authorizing Railway Express and Greyhound to consummate the transaction, even while the question of the correctness of the order authorizing the issuance of the stock is still pending on appeal and accordingly is not administratively final.

We ask, therefore, that the Commission stay the order authorizing Railway Express to issue the 500,000 shares of its stock in order that the Commission may be afforded a reasonable opportunity to judge the merits of our petition for reconsideration, and any reply thereto filed by Railway Express.

Prayer

For the reasons stated, ATA and the Conference respectfully request that the Commission issue an order staying indefinitely, until further order, the effective date of the order of Division 3, served March 16, 1965, permitting Railway Express to issue 500,000 shares of its stock until consideration has been given to our petition for reconsideration, which will be filed on or before April 15, 1965.

[fol. 268] Respectfully submitted,

Regular Common Carrier Conference, R. Edwin Brady, 1616 P Street, N. W., Washington, D. C. 20036.

Roland Rice, Rice, Carpenter and Carraway, 618 Perpetual Building, Washington 4, D. C.

American Trucking Associations, Inc., Peter T. Beardsley, William R. Rubbert, Harry J. Jordan, Paul D. Borghesani, Richard R. Sigmon, 1616 P Street, N. W., Washington, D. C. 20036.

Certificate of Service (omitted in printing).

[fol. 269] [File endorsement omitted]

[fol. 270]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

Docket No. 23324

[Title omitted]

PETITION TO STAY THE EFFECTIVE DATE OF DIVISION 3's ORDER—Filed April 6, 1965

of

Denver Chicago Trucking Company, Inc.; Consolidated Freightways Corporation of Delaware and Missouri Consolidated Freightways Corporation; Illinois-California Express, Inc.; Navajo Freight Lines, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Ringsby Truck Lines, Inc.; Western Gillette, Inc.; Interstate Motor Lines, Inc.; T.I.M.E. Freight, Inc.; and Consolidated Copperstate Lines.

Come now Denver Chicago Trucking Company, Inc.; Consolidated Freightways Corporation of Delaware and Missouri Consolidated Freightways Corporation; Illinois-California Express, Inc.; Navajo Freight Lines, Inc,; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Ringsby Truck Lines, Inc.; Western Gillette, Inc.; Interstate Motor Lines, Inc.; T.I.M.E. Freight, Inc.; and Consolidated Copperstate Lines and file this petition asking the Commission to stay the effective date of Division 3's Order, served March 16, 1965, and as grounds therefor state:

[fol. 271] 1. Your Petitioners were granted leave to intervene in this proceeding, and have continuing interest therein.

2. Your Petitioners take the same position with respect to the necessity for a Stay of the Division 3 Order as set forth in the petition of American Trucking Associations, Inc., and Regular Route Common Carrier Conference, filed April 1, 1965.

3. Your Petitioners intend to file a petition for reconsideration in this matter.

Prayer

Wherefore, your Petitioners respectfully request that the Commission issue an order staying indefinitely until further order, the effective date of the order of Division 3, served March 16, 1965, permitting Railway Express to issue 500,000 shares of its stock until consideration has been given to a petition for reconsideration of these Petitioners which will be filed on or before April 15, 1965.

Respectfully submitted,

David Axelrod, 39 South La Salle Street, Chicago, Illinois 60603, By Eugene T. Liipfert, 1035 Universal Building North 1875 Connecticut Avenue, N. W., Washington, D. C. 20009, Attorneys for Petitioners.

[fol. 272] Certificate of Service (omitted in printing).

[fol. 273]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

Finance Docket No. 23324

[Title omitted]

PETITION OF FREIGHT FORWARDERS INSTITUTE TO STAY THE EFFECTIVE DATE OF THE ORDER OF DIVISION 3—Filed April 8, 1965

Comes now the Freight Forwarders Institute and petitions the Commission to stay the effective date of the order of Division 3 herein dated March 15, served March 16, 1965, and as grounds therefor states:

1. Petitioner was granted leave to intervene in this proceeding by order of the Commission dated February 5, 1965.

2. Petitioner hereby adopts as its own and reiterates the reasons for a stay of the said order set forth in the petition of American Trucking Associations, Inc., and Regular Common Carrier Conference, filed April 1, 1965.

[fol. 274] 3. Petitioner will file a petition for reconsideration of the said order of Division 3.

Wherefore, petitioner respectfully requests that the Commission issue an order staying until further order the effective date of the order of Division 3 hereinabove identified.

Respectfully submitted,

Freight Forwarders Institute, By: Harry C. Ames, 527 Transportation Bldg., Washington, D. C. 20006.

Giles Morrow, 1012 Fourteenth St., N. W., Washington, D. C. 20005.

April 8, 1965, Washington, D. C.

Certificate of Service (omitted in printing).

[fol. 275] [File endorsement omitted]

[fol. 276]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Washington, D. C.

Finance Docket No. 23324

[Title omitted]

REPLY OF RAILWAY EXPRESS AGENCY, INCORPORATED, TO PETITIONS OF AMERICAN TRUCKING ASSOCIATIONS, INC., REGULAR COMMON CARRIER CONFERENCE AND DENVER CHICAGO TRUCKING COMPANY, INC., ET AL., TO STAY THE EFFECTIVE DATE OF ORDER OF DIVISION 3—Filed April 9, 1965

I

On October 7, 1964, Railway Express Agency, Incorporated (REA) initiated this proceeding by filing with the Interstate Commerce Commission an application (assigned Finance Docket No. 23324) under Sections 20a and 214 of the Interstate Commerce Act for authority to issue 500,000 [fol. 277] shares of REA's Common Stock, par value $1 per share, to The Greyhound Corporation pursuant to the terms and conditions set forth in the application. Subsequently, various parties filed petitions to intervene in this proceeding and requested a hearing and other proceedings. By Order of Division 3 served on March 16, 1965, Division 3 found that the proposed issue by REA satisfied the standards set forth in Sections 20a and 214 of the Interstate Commerce Act, authorized the proposed issue pursuant to said Sections and denied the petitions of interveners for a hearing and other proceedings. Said Order provided by its terms that it will become effective 35 days from the date it was served.

Petitions were filed with the Commission on April 1, 1965, by American Trucking Associations, Inc., and Regular Com-

mon Carrier Conference and on April 6, 1965, by Denver Chicago Trucking Company, Inc., et al.* (hereinafter collectively called the Petitioners), requesting the Commission to stay "indefinitely" the effective date of Division 3's Order until consideration could be given to petitions for reconsideration which the Petitioners alleged will be filed by them [fol. 278] on or before April 15, 1965.

REA has no objection to a stay of Division 3's Order until all petitions for reconsideration duly filed on time shall have been considered and disposed of pursuant to the rules and regulations of the Commission, but REA urges that all such petitions as may be filed be considered and disposed of as soon as possible.

II

REA has little doubt that if any of the Petitioners should file with Division 3 by April 15, 1965, a petition for reconsideration of Division 3's Order, the effective date of said Order would be automatically stayed, pursuant to the Interstate Commerce Act and the rules and regulations of the Commission, until the disposition of such petition for reconsideration.

As stated above, REA has no objection to a stay of Division 3's Order pending consideration of all petitions for reconsideration which may be duly filed on time. REA expresses no opinion on whether the Commission should grant or deny the petitions for stay filed by the Petitioners, be- [fol. 279] cause the requested stay will result in either case. If such petitions should be granted, however, the Commission should not stay Division 3's Order "indefinitely", as

* In addition to Denver Chicago Trucking Company, Inc., the following are alleged to have filed said petition: Consolidated Freightways Corporation of Delaware; Missouri Consolidated Freightways Corporation; Illinois-California Express, Inc.; Navajo Freight Lines, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Ringsby Truck Lines, Inc.; Western Gillette, Inc.; Interstate Motor Lines, Inc.; T.I.M.E. Freight, Inc.; and Consolidated Copperstate Lines.

the Petitioners request, but rather should stay said Order until a petition for reconsideration, duly filed on time by the Petitioners, shall have been considered and disposed of.

III

REA does not, however, acquiesce in an indefinite prolongation of this proceeding. REA needs badly the $10,000,000 proceeds of the stock issue and urges that all petitions for reconsideration filed in this proceeding be expeditiously considered and disposed of.

In its Order, Division 3 concluded:

> "That applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000".

That conclusion is amply supported by the record which was before Division 3. REA's need for the proceeds of the proposed issue is no less urgent now than it was last Oc- [fol. 280] tober 1, 1964, when REA stockholders overwhelmingly approved the proposed stock issue. Six months have already passed since that date and REA has still not received the proceeds of the proposed issue.

REA is confident that Division 3 will be sustained in its finding that the proposed issue by REA satisfies the standards of Sections 20a and 214 of the Interstate Commerce Act and should be authorized by the Commission thereunder. And REA desires that all petitions for reconsideration of Division 3's Order be duly considered and disposed of. But REA wishes to emphasize again that such petitions

should be speedily considered and disposed of so that REA may receive the proceeds of the proposed issue as soon as possible.

Dated this 7th day of April 1965.

William J. Taylor, Alan F. Doniger, Joel H. Gross, Henry P. Riordan, Counsel for Applicant Railway Express Agency, Incorporated.

[fol. 281] Certificate of Service (omitted in printing).

[fol. 282] [File endorsement omitted]

[fol. 283]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-F-23324

[Title omitted]

PETITION FOR RECONSIDERATION OF THE ORDER OF DIVISION 3—
Filed April 14, 1965

Now come Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Bayshore Buslines, Inc., Continental Bus System, Inc., Continental Crescent Lines, Inc., Continental Panhandle Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Inc., Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Bus Lines, Inc., and Muscatine, Davenport and Clinton Bus Company, Petitioners herein, and for cause would show to the Commission as follows:

Statement of Facts

Docket No. MC-F-23324 is the application of Railway Express Agency, Inc., (REA) for authority, under Sec-

tions 20a and 214 of the Interstate Commerce Act, to issue securities. REA proposes to issue 500,000 shares of its authorized but unissued shares of common stock to the Greyhound Corporation (Greyhound) for a total price of Ten Million Dollars ($10,000,000.00).

In opposition to said Application to issue securities, Pe- [fol. 284] titioners timely filed Petitions seeking: (1) leave to intervene; (2) to require REA and Greyhound to file an application under Section 5 of the Act; (3) and to consolidate the securities and Section 5 application for hearing on a common record. Petitioners also requested that oral hearings be held on the instant application. By Order served December 8, 1964, Petitioners were permitted to intervene in this proceeding.

By Order dated March 15, 1965, served March 16, 1965, Division 3 denied the Petitions for hearing and other proceedings, and authorized REA to issue not exceeding 500,000 shares of common stock of the par value of $1.00 each. Petitioners respectfully submit that Division 3 has erred in its decision and requests that the matter be reconsidered.

Conclusions and Findings Requested to Be Reconsidered

Petitioners request that the following conclusions and findings contained in the Order of Division 3 be reconsidered:

1. The conclusion that an investigation of whether the proposed transaction, or further prospective agreements between Applicant and Greyhound, might violate the provisions of Section 5 would not be appropriate at this time.

2. The conclusion that a hearing is not necessary for a determination of the application for authority to issue stock under the provisions of Sections 20a and 214.

3. The finding that the proposed issue by REA (a) is for a lawful object within its corporate purposes and com-

patible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company and a common carrier by motor vehicle, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

[fol. 285]

An Investigation of Whether the Proposed Transaction Will Result in Control or Power to Control Is Proper at This Point in the Proceeding

If it be shown that the proposed transaction will result in Greyhound controlling, or having the power to control REA, then the Commission must require Greyhound to file an application under Section 5 of the Act. The question of control, or power to control, is governed by the facts and circumstances existing in each case and is not dependent upon a majority ownership of stock. *Rochester Telephone Co.* v. *United States,* 307 U.S. 125.

The facts and circumstances existing in the proposed transaction have not been fully and fairly presented. They cannot be so presented unless and until this matter is the subject of an oral hearing. The Order of Division 3 is based solely upon the statements of representatives of REA and Greyhound, who were not subjected to cross-examination by the protesting Intervenors.

Division 3 has concluded that it is unlikely that Greyhound could sway the thinking of the other Directors elected from the railroad owners of REA and that control or power to control must be real and not based on conjecture or remote possibility. Division 3's conclusion is based solely upon the fact that Greyhound will only have 20% of REA stock and can only elect five of twenty-five Directors. In other words, the decision is based solely upon stock ownership.

Division 3 has apparently failed to consider the power of Greyhound to control REA by means other than stock

ownership, viz: control of terminal facilities, interline express, economic pressure and etc. REA has for a number of years indicated that they are in dire financial trouble, and their application states that they *urgently* need the proceeds from the sale of this stock and that they are handicapped in borrowing funds because of their unfavorable debt-equity ratio. All of these facts would tend to indicate that Greyhound will exercise considerable economic power over REA.

[fol. 286] The Commission has consistently held that control or power to control is not necessarily dependent upon a majority ownership of stock. While the acquisition by Greyhound of 20% of REA common stock would not normally be considered as control, there are many other factors to be considered. REA has indicated that the proceeds from the sale of stock will be used in its program of acquiring and modernizing terminals and equipment. Greyhound already has thousands of terminals throughout the entire United States, and it is the stated intention of Greyhound and REA to work towards an agreement between themselves to consolidate operating functions and facilities. Rather than use the money to acquire and modernize terminal facilities, REA would be more likely to use the existing facilities of Greyhound. In this event, Greyhound would not only exercise considerable economic power over REA but would also exercise considerable power over terminal facilities and interline express.

The Commission inquired as to whether or not the purchase of additional shares by Greyhound would increase Greyhound's representation on the Board of Directors proportionately. REA replied and stated that the by-laws of REA do not provide for any such proportionate representation and such by-laws may be amended only by the affirmative vote of two-thirds of REA stock issued and outstanding. Division 3 has apparently assumed that Greyhound could not influence two-thirds of the issued and outstanding shares of stock to amend the by-laws to provide for proportionate representation on the Board of Direc-

tors, and has stated that it is unlikely that Greyhound could influence the thinking of a sufficient number of directors to achieve control of REA.

[fol. 287] However, Division 3 apparently has not considered some of the former affiliations of Greyhound. Greyhound, with 500,000 shares of REA stock, the New York Central Railroad, with 294,792 shares of REA stock, the Pennsylvania Railroad Company, with 261,576 shares of REA stock, and the Great Northern Railway Company, with 31,140 shares of REA stock, between them lack only, approximately, 600,000 shares of stock in order to obtain the necessary two-thirds of the outstanding stock necessary to change said by-laws. These are railroads that have had close affiliations with Greyhound. At one time the New York Central Railroad owned 50% of the voting stock of Central Greyhound Lines, Inc. At one time the Pennsylvania Railroad Company owned 50% of the voting stock of Pennsylvania Greyhound Lines, Inc. At one time the Great Northern Railway Company owned 45% of the voting stock of Northland Greyhound Lines, Inc. Greyhound subsequently acquired a majority of the voting stock of all of the aforementioned bus companies and they were merged into the Greyhound Corporation.

It is apparent that the railroads of the eastern and southern districts, along with Greyhound, could place the control of REA in the hands of Greyhound. It should be remembered that not a single eastern or southern district railroad opposed the proposed stock issuance, and only a minority of the western district railroads oppose said transaction. Division three has apparently been convinced that these are remote possibilities. Their decision is based upon the statements and representations of REA and Greyhound, which statements and representations are nothing more than self-serving declarations. Petitioners submit that the Commission should have all the facts before them before any decision is made. This can only be done if a full and complete investigation be ordered at this time.

[fol. 288]

The Proposed Stock Issuance Is Not Compatible With the Public Interest and Is Neither Necessary Nor Appropriate for or Consistent With the Proper Performance by REA of Service to the Public as an Express Company and a Common Carrier by Motor Vehicle

REA has stated in its application that the proposed transaction will provide a working basis for REA and Greyhound entering into an agreement with respect to the consolidation of certain operating functions and facilities. The Order of Division 3 will permit REA and Greyhound to do exactly what they have proposed. This means a consolidation of the operating functions and facilities of the largest motorbus company in the world (who derived $30,220,460.00 in 1963 from the transportation of express in the same vehicle with passengers) and the largest express company in the world.

REA and Greyhound competitors will be faced with a new form of competition not heretofore experienced by them. This will be new competition and can only result in a diversion of the express revenue needed by these Petitioners to maintain a continuous and adequate service to the public. Such a result would be contrary to the public interest.

Many of the Petitioners' passenger operations are dependent upon express revenue in order to render continuous and adequate service to the public. The consolidation of REA and Greyhound facilities and operations would, in effect, destroy all competition in the package express phase of motorbus transportation. No motorbus company could hope to meet the competition offered by such a consolidation. Such consolidation would only result in a restraint of competition and would not be compatible with the public interest.

The foregoing is especially true in light of the application of REA, in Docket No. MC-66562 et al., to remove the [fol. 289] rail-haul restrictions from their existing certificates. Removal of rail-haul restrictions from their existing

certificates will permit REA to transport express wholly by motor vehicle in direct competition with Petitioners. When considered in conjunction with the consolidation of REA and Greyhound facilities and operations, it is clearly evident that this will result in a substantial diversion of Petitioners' express revenue.

Petitioners submit that the issuance of stock by REA to be sold to Greyhound is not in the public interest and is neither necessary nor appropriate for, or consistent with the proper performance by REA of service to the public as an express company or common carrier. As stated by the Commission in *Railway Express Agency, Inc.,—Extension—Nashua, N.H.*, 91 MCC 311, the Commission must, in accomplishing the purposes forming the national transportation policy, provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act and *recognize and preserve the inherent advantages of several modes of transportation.* The Order of Division 3 will undoubtedly destroy the customary distinctions between and inherent advantages of the several modes of transportation.

Annex 'G' of REA's Return to Information Request to REA, dated November 16, 1964, purports to show the benefits accruing to REA and Greyhound from the proposed consolidation. It states that the figures contained therein are *estimates* of the economies and additional revenue which they expect to achieve by the proposed consolidation. As to whether or not there would be any resulting economies from the proposed consolidation and whether or not such economies, if any, are outweighed by the competitive harm resulting to competing carriers, is not a matter that can be determined by the self-serving declaration of REA and [fol. 290] Greyhound. The public interest demands that the Commission weigh the alleged benefits against the alleged competitive harm before reaching a decision, and to do so the Commission must hear *all* the facts and circumstances.

While the proposed consolidation might result in certain economies for REA and Greyhound, it will certainly result

in additional revenue to both carriers. It cannot be denied that the combined efforts of REA and Greyhound will place Petitioners in a position of being unable to compete with them for express revenue and will result in a restraint of competition; which is not in the public interest.

A Hearing Is Necessary for a Proper Determination of the Application

The question of whether the proposed stock issuance to Greyhound will result in Greyhound having the power to control REA cannot properly be resolved until all the facts are before the Commission. This can only be accomplished by the Commission holding hearings on the instant application.

The application presents issues and questions never before considered by this Commission. The consolidation of a bus company and express company has never been attempted under the Act, and whether the issuance of stock by REA to Greyhound is in the public interest and consistent with the proper performance by REA of service to the public is a matter that can only be decided after a full hearing on the issues.

It is imperative that a hearing be held so that Petitioners may properly show the adverse effect the issuance of stock by REA to Greyhound would have upon the existing competitive situation. The evidence of express revenue subject [fol. 291] to diversion consists of voluminous and complicated exhibits that will require extensive oral explanation for a clear understanding. The competitive harm that will result from a grant of the requested authority is a vital issue in this proceeding, and cannot properly be developed without the introduction of voluminous exhibits and extensive testimony from competent witnesses.

The application of REA raises numerous issues concerning proper regulatory policy as related to: the public interest; the maintenance of sound economic conditions in transportation and among the several carriers; the ren-

dering of transportation service without unjust discrimination, undue preferences or advantages, or unfair and destructive competitive practices; and the preservation of the inherent advantages of the several modes of transportation. A proper determination of these issues requires that an oral hearing be held.

Requested Findings

Petitioners respectfully request that Division 3 reconsider its Order of March 15, 1965, and make the following conclusions and findings:

1. That an investigation of whether the proposed transaction will result in control or power to control is proper at this point at the proceedings.

2. That a hearing is necessary for a proper determination of the issues involved in this Application.

3. That the proposed stock issuance is not compatible with the public interest and is neither necessary nor appropriate for or consistent with the proper performance by REA of service to the public as an express [fol. 292] company and a common carrier by motor vehicle.

Wherefore, Petitioners pray that the Order of Division three be reversed and the Application be in all things denied; or, in the alternative, that the order of Division three be vacated and the Application be set for hearing at such time as the Commission may determine.

Respectfully submitted,

Transcontinental Bus System, Inc., et al., Warren A. Goff, D. Paul Stafford, 315 Continental Avenue, Dallas, Texas 75207, Attorneys for Petitioners.

Certificate of Service (omitted in printing).

[fol. 293] BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324[1]

[Title omitted]

PETITION FOR RECONSIDERATION AND ORAL HEARING OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS—Filed April 14, 1965

PRELIMINARY STATEMENT

The Railway Express Agency, Incorporated (REA), by application filed October 7, 1964, in Finance Docket No. 23324, as last supplemented November 17, 1964, sought authority under sections 20a and 214 of the Interstate Commerce Act to issue 500,000 shares of common stock, par value of $1.00 per share, to be sold to The Greyhound Corporation (Greyhound) at a price of $20.00 per share.

The application was certified by Finance Board No. 2 to Division 3, which, by order dated March 15, 1965, granted the application of REA. The order of Division 3 also dismissed the complaint filed by Southern Pacific Company in Finance Docket No. 23374 requesting the Commission to invoke the provisions of section 5(7) of the act, and after hearing and investigation to require REA and Greyhound to cease and desist from consummating the proposed transaction. The application and complaint were disposed of without written or oral evidence or argument and based solely upon the application filed under sections 20a and 214, the complaint filed under section 5, and the several petitions for leave to intervene.

[fol. 294] Petitioners, by joint petition for leave to intervene and protest, opposed the proposed issue of 500,000

[1] The order dated March 15, 1965, also embraces the complaint in Finance Docket No. 23374, *Southern Pacific Co.* v. *Greyhound Corp. and Railway Express Agency, Inc.*

shares of common stock to Greyhound by REA on the grounds that it did not warrant the findings prerequisite to authorization under section 20a and that the application seeking approval of the proposed issue was an attempt to effect control of REA by Greyhound without obtaining approval and authorization therefor under section 5 of the Act.

REASONS JUSTIFYING RECONSIDERATION

I.

The findings of Division 3 in the fourth paragraph on sheet 3 do not satisfy the statutory requirements of section 20a(2).

The Commission, in approving issuance of securities, is to determine whether the issuance will be "compatible with the public interest" and whether the issuance "is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public . . ." Section 20(a)(2), 49 U.S.C.A. § 20a(2). Certainly, no transaction violating section 5 of the Interstate Commerce Act, through an unauthorized acquisition of control or the power to control, can be deemed compatible with the public interest or appropriate for or consistent with the proper performance by a carrier of service to the public.

The order of March 15, 1965, states (sheet 2):

> *"It further appearing,* That applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000."

[fol. 295] This finding is the only apparent basis for the subsequent finding by Division 3 that the proposed stock issue conforms to the prerequisites to authorization under section 20a(2).

It will be noted that the only party supporting the application in Finance Docket No. 23324 is Greyhound, a non-railroad corporation, while opposition to the proposed issue comes not only from various railroads, some with substantial stock holdings in applicant, but also from bus systems, trucking companies, trucking associations and the Freight Forwarders Institute.

The dominant purpose of the financial provisions of section 20a is to maintain a sound structure for support of railroad credit to aid in developing a national transportation system. *Chicago S. Shore & S. Bend R. R.* v. *United States*, 221 F.Supp. 106, 108 (1963). But, aside from this purpose, it seems clear that the phrase "compatible with the public interest" was intended to embrace the interests of the protestants, which provide essential transportation services to vast areas of the nation. The term "public interest" is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *Texas* v. *United States*, 292 U.S. 522, 531 (1934).

Division 3, in approving the proposed stock issue, stresses the need of applicant for additional financing. This narrow view of the proposed stock issue fails to consider the broader intent and purpose of the proposed stock issue and the possible adverse effect upon protestants in providing transportation services to the public. In this respect, it is significant that the sale of 20 per cent of applicant's [fol. 296] stock to Greyhound is not for investment, but for the stated purpose of consolidating operating functions and facilities between applicant and Greyhound. This stated purpose is evident from the fact that as a condition prece-

dent to REA's agreement to sell 500,000 shares of stock to Greyhound the latter agreed to offer to purchase an additional 1,000,000 shares of stock from present shareholders in REA.

Certainly, in the face of the stated purpose of the proposed stock issue, it cannot be said that the proposed issue is "compatible" with the interests of protestants, whether shareholders in REA or not. The mere finding by Division 3 that the applicant is in need of additional financing does not, in light of the overwhelming opposition by protestants representing broad segments of the transportation industry, support its finding that the proposed issue is "compatible with the public interest."

II.

Division 3 erred in not opening its investigation and permitting an oral hearing.

Admittedly, the proposed issue and sale to Greyhound of 500,000 shares of REA's authorized but unissued stock is one step "to consider seriously and work toward a long-term agreement between applicant and Greyhound to consolidate operating functions and facilities." Otherwise, Greyhound would not have coupled its purchase with the offer to buy 1,000,000 additional shares. Petitioners, therefore, submit that the application by itself envisions a plan which could have far reaching effects on the national transportation system and that procedural orderliness requires that a hearing be held at this time for the purpose of cross-examining officers of the applicant, as well as receiving [fol. 297] evidence of protestants. Yet, in the face of the stated long range intention and purpose of applicant and Greyhound, Division 3 summarily granted the application without hearing on the serious questions of unlawful control, or power to control, presented by the facts recited in the order of March 15, 1965.

The denial of an oral hearing here appears to be based on the reasoning that the interest of protestants can be

inquired into by holding a hearing if and when Greyhound voluntarily files an application under section 5. This "piecemeal" treatment may come too late; and in any event constitutes an abdication of the responsibilities vested in the Commission by paragraph (7) of section 5 to take timely and effective action on its own initiative to forestall violation of section 5. The facts here warrant and require a fuller inquiry now by the Commission into the initial acquisition of stock of REA by Greyhound to avoid any disruptive effect the broad plan of REA and Greyhound may have on the services provided by protestants. Precisely what degree of stock ownership constitutes control, or power to control, is a question of fact. Often, elements in addition to the bare extent of stock ownership must be considered and are sometimes of vital significance. The Commission in the past has more than once recognized that a 20 per cent stock ownership under certain circumstances constituted control or the power to control. It is true, as the order of March 15, 1965 herein observes, that "control or power to control must be real and not based on conjecture or remote possibilities." It is equally true, however, and strikingly apposite in the present context, that a finding of no control, or power to control, must rest upon a full exposure of the facts and not, as in the order of March 15, 1965, upon the mere conjecture or assumption there made (sans evi-[fol. 298] dence) that "it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant . . ." Surely, so fundamental a conclusion, ordinarily reached only after the most careful weighing of all pertinent evidence offered, requires for its foundation something more than the mere pleadings filed in the proceeding; significantly, *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703, 714, relied upon in the portions of the order quoted above, was not decided without hearing.

Conclusion

Petitioners respectfully submit that the order of Division 3 herein is erroneous because its findings are not based on sufficient evidence to satisfy the statutory requirements of section 20a(2) and, therefore, petitioners request that the Commission reconsider its order of March 15, 1965, vacate such order and grant oral hearing for the purpose of receiving additional factual information bearing on the issues involved.

Respectfully submitted,

Clyde W. Fiddes, Harry B. LaTourette, Jeremiah C. Waterman, Thormund A. Miller, By Harry B. LaTourette, Attorneys for Petitioners.

Tyler, Texas, April 13, 1965.

[fol. 299] Certificate of Service (omitted in printing).

[fol. 300]

Before the
Interstate Commerce Commission

Washington, D. C.

Finance Docket No. 23324

[Title omitted]

Petition—Filed April 14, 1965

Comes now Freight Forwarders Institute to file this its petition for reconsideration of the order of Division 3, dated March 16, 1965, in the above-entitled cause. As grounds for such petition it is respectfully shown:

If the Order in Question Is Made Effective It Will Amount to an Abdication of the Commission's Duty to Enforce the Act.

Division 3's order would have been easier to evaluate and understand if the decision had been framed as a report and order, in the usual manner, so that the findings of fact and conclusions of law could be identified as such. "The administrative process will best be vindicated by clarity in its exercise." [1] As it is the findings are set out in [fol. 301] "appearing" paragraphs, and are intermingled with statements of the case. The findings, nevertheless, are capable of being identified and we think that they show, among other things, that the duty of the Commission in the case at bar has been misconceived.

The first finding of consequence made by the order is in the paragraph reading:

> *It further appearing,* That the filing of an application under section 5 of the act is permissive and may not be required by us, see *Seaboard Air Line R. Co. —Merger—Atlantic Coast Line,* 320 I.C.C. 122 (127); that an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time; and that a hearing is not necessary for a determination of the application for authority to issue said stock under the provisions of sections 20a and 214.

We understand that the Commission has no power to require the filing of an application under section 5, and in our petition of October 20, 1964, herein, which the Division has denied we did not ask the Commission to require the filing of such an application. By the same token, the Commission has no power to require the filing of an applica-

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[1] *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 197; *Securities Comm.* v. *Chenery Corp.,* 318 U.S. 80, 94.

tion to institute operations as a carrier subject to the Act, but it most certainly has a duty to prevent the institution of operations *without proper authority* and it has a similar duty to prevent the acquisition of control of one carrier by another without authority. We alleged in our petition that the "broad and important issues raised by this application should not be resolved by the Commission on the [fol. 302] bare facts and allegations set forth in the documents filed by REA." We asked that the matter be set for hearing "for the purpose of exploring fully the question of control of REA by Greyhound which is implicit in the application."

Overruling our request, the Division did resolve the issues on the basis of the facts set forth in the application. In the paragraph quoted above the Division found further that an investigation of whether the "proposed transaction" (this refers not simply to the issuance of stock but to the sale of a 20-percent stock interest in REA to Greyhound) "would not be appropriate at this time." The veiled implication that such an investigation might be appropriate at some other time does not satisfy the mandate that the law imposes upon the Commission. The Division went on, in the same paragraph, to find that "a hearing is not necessary for a determination of the application for authority to issue said stock." We did not ask for a hearing on the question of the issuance of the stock, but upon the consequences thereof, and yet the Division, taking refuge behind the narrow question of stock issuance, necessarily made findings on the broader questions of control on the self-serving and untested statements set forth in the application.

Under Section 12(1) of the Act this mandate is laid down:

> The Commission is hereby authorized and *required* to *execute* and *enforce* the provisions of this part; * * *[2]

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[2] Italics for emphasis is ours throughout.

[fol. 303] Under Section 5(4) it is provided that:

> It shall be unlawful for any person, except as provided in paragraph (2), *to enter into any transaction within the scope of subparagraph (a)* thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained * * *.

It is no answer to the serious allegations that control or the power to control lurks in the involved application to say that the "filing of an application under section 5 of the act is permissive and may not be required" by the Commission. The Commission's "jurisdiction" under Section 20a is "exclusive and plenary" but its jurisdiction and its duty are two entirely different matters. In this case the Division has made an order which is not compatible with the duty of the Commission. That order has the effect of authorizing the applicants in this proceeding to enter into a "transaction" which a very substantial segment of the transportation industry of this country contends may very likely be within the scope of Section 5. Yet those contentions are swept aside without a hearing. This amounts to an abdication of the plain duty of the Commission.

The Findings on Which Division 3 Has Predicated Its Order Are Findings Which Could Properly Be Made Only in a Proceeding Under Section 5 and No Such Proceeding Has Been Instituted.

The Division's order not only authorizes REA to issue 500,000 shares of stock—it authorizes the sale of such stock, [fol. 304] at not less than $20 per share, to "a non-railroad corporation" the name of which, though not used in the ordering paragraph is set forth in the first "appearing" paragraph as The Greyhound Corporation. While this has been handled as a proceeding to issue stock under Section 20a the Division's order is framed as though the proceed-

ing had been brought under Section 5, and in its order Division 3 proceeds to dispose of the Section 5 questions on the untested allegations and representations of the applicants.

In the 12th "appearing" paragraph Division 3's order makes the following statements and findings:

> *It further appearing,* That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that *it was told in negotiations by representatives of the railroads,* including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; *that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board;* that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound, that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; *that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant,* and that control or power to control must be real and not based on conjecture or remote possibilities, *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703 (714);

That the foregoing is not a mere recitation of what Greyhound "was told" by representatives of the railroads, but [fol. 305] is a series of positive findings that no Section 5 violation will result from the approved transaction is made abundantly clear by the 13th "appearing" paragraph, which is as follows:

It further appearing, That if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition; and it appearing that Greyhound has acknowledged the requirements of section 5 in this regard and has stated that it will file a timely application; and that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5; and

The final "appearing" paragraph, which follows immediately after the two paragraphs quoted next above, is prefaced with the statement that "the said Division so finds." It is perfectly clear, however, that although the quoted 12th and 13th "appearing" paragraphs are not identified as "findings" they nonetheless contain the findings of fact and law on which the Division predicated its conclusions, in the 14th paragraph that:

It further appearing, and the said Division so finds, that the proposed issue by Railway Express Agency, Incorporated, of not exceeding 500,000 shares of common stock of the par value of $1 each, as aforesaid, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company and a common carrier by motor vehicle, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

[fol. 306] Let us examine "appearing" paragraph 12 to determine whether the findings and conclusions stated

therein have evidentiary support and whether, in any event, they were properly made in this Section 20a proceeding.

The first assertion, in paragraph 12, is that Greyhound initiated the negotiations which culminated in this proceeding by offering "to purchase a controlling stock interest" in REA. Failing in its initial efforts to acquire a "controlling stock" interest Greyhound later offered to "accept equal stock ownership" with the railroads. This effort also being fruitless, we are told that Greyhound "finally agreed to purchase the 20-percent stock interest" as described. Since Greyhound admittedly inaugurated the negotiations with control in mind, and retreated step by step to a 20-percent stock interest, is it logical to assume that Greyhound abandoned all thought or hope of control and settled for a mere investment? We think not. There is little in the history of REA operations in the recent past to encourage Greyhound in the belief that such an "investment" would be sound, *per se*. The more logical assumption is that Greyhound adheres to its purpose of gaining control of REA.

The next clause in Paragraph 12 recites what Greyhound was "told" by representatives of the railroads, including the "dissident" railroads. Greyhound, according to the statement, was "told" that it would not acquire one additional share of stock under the offer to purchase up to one million shares subject to the right of first refusal. The [fol. 307] Division evidently accepted this statement of what Greyhound was "told" (which was lifted from the application) as an answer to our contentions that if the involved 20-percent interest does not represent control it is at least a "first step" in a movement to transfer control to Greyhound. We do not think that applicant's statement of what Greyhound was "told" by the railroads is the best evidence of what the facts are. If Greyhound's offer to purchase additional shares of stock is an empty gesture, we are prompted to inquire why the offer was included in the agreement.

The remaining portions of Paragraph 12 consist of findings of fact and law which represent an obvious attempt to dispose of a Section 5 proceeding in a Section 20a case. They do not purport to set out what Greyhound was "told" by representatives of the railroad, but stand as findings made by the Division. The first finding is that:

> * * * the make-up of the board of directors under the by-laws, as amended, would *not permit Greyhound to control the board.*

How could the Division possibly draw such a conclusion from the bare statements made in the application? In the very case cited by the Commission in Paragraph 12, *New York, C. & St. L. R. Co., Control,* 295 I.C.C. 703, the Commission said that: "The existence of control is an issue of fact to be determined not by artificial tests, but by the [fol. 308] circumstances of each case." But the Division has made a determination here by a simple counting of noses.

The next and most astonishing finding made by Paragraph 12 of this Section 20a proceeding is that:

> * * * 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant * * *

The foregoing is predicated on a number of assumptions, none of which has been established. It assumes that the railroad directors would vote as a bloc. If we are to deal in assumptions the opposite conclusion would seem to be indicated. If it is not clear in the application it is a matter of common knowledge that certain railroads would have accepted Greyhound's first offer of complete acquisition of REA. If those railroads are still of the same mind,

why would they not vote with Greyhound instead of with the "dissident" railroads?

The order seems to recognize that there are strong directors and directors who are not so strong. It assumes that it is "unlikely" that 5 Greyhound directors would "sway the thinking" of 8 "such directors" of the "calibre normally holding such positions with applicant." Is the Division fully informed as to the "calibre" of REA di- [fol. 309] rectors, and is it in a position to know what "calibre" of directors Greyhound might nominate?

Finally, Paragraph 12 states that "control or power to control must be real and not based on conjecture or remote possibilities." We agree. We seek a hearing in order that it may be demonstrated that the power to control in the situation at bar is real. We assert that the question of control or the power to control may not be dismissed from consideration based on purely self-serving assertions.

The foregoing findings of fact and law have been made by Division 3 as a predicate for its conclusion that the issuance of stock by REA and the sale of that stock to Greyhound "is for a lawful object" and is "compatible with the public interest." Clearly the transaction would not be lawful or in the public interest if it should result in Greyhound obtaining control or the power to control REA. It is equally clear that Division 3 has made findings of fact and law in this proceeding which may only be made in a proceeding under Section 5. Such a Section 5 proceeding has not been instituted and the mandate of Section 5 that the Commission "shall afford reasonable opportunity for interested parties to be heard" has not been observed.

Conclusion

For the reasons set forth herein we respectfully request that the order of Division 3 served herein on March 16, [fol. 310] 1965, be reconsidered and set aside and that the proceeding be set for hearing on the question of whether the proposed transaction will result in Greyhound obtaining control or the power to exercise control of REA, and

that such hearing embrace the further issue, referred to in our petition herein, of the lawfulness of the pooling arrangement between REA and the railroads approved by the Commission in 1959, in the light of the changed circumstances and conditions which would prevail if the application is approved.

Respectfully submitted,

Freight Forwarders Institute, By: Harry C. Ames, 527 Transportation Bldg., Washington, D. C. 20006;

Giles Morrow, 1012 Fourteenth St., N. W., Washington, D. C. 20005, Attorneys.

April 15, 1965

Certificate of Service (omitted in printing).

[fol. 311]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK

Finance Docket No. 23374

SOUTHERN PACIFIC CO.

v.

GREYHOUND CORP. and RAILWAY EXPRESS AGENCY, INC.

PETITION FOR RECONSIDERATION OF INTERVENER AND COMPLAINANT SOUTHERN PACIFIC COMPANY—Filed April 14, 1965

Preliminary Statement

By order dated March 15, 1965, served March 16, 1965, Division 3 of the Interstate Commerce Commission authorized Railway Express Agency, Incorporated, to issue not exceeding 500,000 shares of common stock at a par value of $1 each to be sold to The Greyhound Corporation at a price of $20 per share. This order grants the relief requested in the application filed October 7, 1964, assigned Finance Docket No. 23324, as last supplemented November 17, 1964.

Said order also dismissed the complaint filed by Southern Pacific Company in Finance Docket No. 23374, holding, in effect, that the Commission has no jurisdiction to prevent a party from entering into a transaction made unlawful by paragraph (4) of section 5 of the Interstate Commerce Act, and that its jurisdiction is limited to requiring a person to withdraw from such a transaction only after it has been consummated. (This was the sole ground advanced in de-

[fol. 312] fendant The Greyhound Corporation's motion to dismiss.)

No hearing was granted in either proceeding before the issuance of the order.

Petitioner, Southern Pacific Company, believes that said order dated March 15, 1965, is in error and does not correctly state the law, and respectfully urges that the decision be reconsidered.

The order of March 15, 1965, states (sheet 1):

> "*It further appearing,* That the filing of an application under section 5 of the act is permissive and may not be required by us, see *Seaboard Air Line R.Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122 (127); . . ."

The cited case does not so hold, but merely points out that the *consummation* of a transaction, whether approved in its original form or as modified by the Commission, is permissive and not mandatory. The only reference to the filing of applications under section 5 in the quoted decision is when the Commission properly pointed out that in *merger* proposals the initiative rests with the railroads to present the merger proposal for approval. Naturally, since merger cases involve mutual agreement, there is nothing unusual in leaving the initiative for filing with the parties to the merger agreement. These proceedings do not involve a merger, and any such language is completely inapplicable to the necessity for the filing of an application under section 5 of the Interstate Commerce Act in the instant proceedings.

It is the Interstate Commerce Act itself which gives the [fol. 313] Commission jurisdiction to prevent a party from entering into a transaction made unlawful by paragraph (4) of section 5 of the Interstate Commerce Act. This power is found in paragraph (7) of section 5, which au-

thorizes the Commission "to investigate and determine whether any person is violating the provisions of paragraph (4)". Paragraph (4) makes unlawful two distinct acts: (1) the acquisition of unauthorized control and (2) the continuance of the maintenance of an unauthorized control after it has been acquired. The first sentence of paragraph (4) refers to the *first* of these acts in stating that "it shall be unlawful . . . to enter into any transaction within the scope of [paragraph 5(2)(a)], or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management" without authority. The second sentence of paragraph (4) refers to the *second* of these acts by stating that "it shall be unlawful to continue to maintain control or management accomplished or effectuated . . . ."

Thus, the Commission has the power, under paragraph (7), to investigate and determine whether a person is violating the provisions of paragraph (4) by either engaging in any process of acquiring unauthorized control *or* continuing to maintain such control after it has been acquired. The full Commission made this absolutely clear in its decision in Finance Docket No. 21314, *Southern Pacific Co.—Control—Western Pacific R. Co.*, served February 3, 1965, when it stated (sheet 13):

> ". . . we are authorized by section 5(7) of the act to institute an investigation of a *possible* violation of section 5 . . . ." (Emphasis added.)

[fol. 314] The legislative purpose of section 5(7) was to allow the Interstate Commerce Commission to enforce section 5(4) effectively, even though a prospective applicant might fail to file an application as required. The making of a determination of whether or not there has been a failure to file under section 5 as is required can only be accomplished after hearing and receipt of evidence. In these proceedings the Commission has summarily denied many interveners, plus complainant Southern Pacific Company,

the privilege of presenting evidence to substantiate a possible violation of section 5. Perhaps the best statement to sum up this argument is that made by the Commission in *New York, C. & St.L. R.Co. Control,* 295 I.C.C. 703, 714 (1958):

> ". . . It has been held that the law aims at the acquisition of controlling power and does not await an actual demonstration of such power."

Although Division 3 may very well be aware of the basic principle which has been heretofore stated by this Commission, it takes the position that control or power to control must be real and not based on conjecture or remote possibilities, and yet it seems clear that the only possible way to arrive at such a conclusion of fact is after a hearing and the development of a record to determine what the facts really are. In these proceedings it is perfectly clear that, as a condition precedent to R E A's agreement to sell 500,000 shares of stock to Greyhound, Greyhound agreed to offer to purchase an additional 1,000,000 shares of stock from present shareholders in R E A. Certainly, in the face of these facts, it is difficult to say that the objections of petitioner Southern Pacific Company and other opposing [fol. 315] parties are based on mere "conjecture" and are "remote possibilities".

The order of March 15, 1965, confuses the voluntary filing of an application under section 5 and the clear power of the Commission to investigate under section 5(7) of the Act. The decision points out that it would not be appropriate at this time to make an investigation as to whether the proposed transaction violates the provisions of section 5, and yet, in making such a statement, the Commission can only be relying upon *its* expectation of what might or might not happen in the future. In view of the condition precedent referred to above, it is submitted that this is an improper basis for reaching decisions on questions of fact which should and must in all fairness be based upon evi-

dence and not upon expectations as to events which may or may not occur in the future.

The decision of March 15, 1965, is further inconsistent by pointing out that if in the future the acquisition of control or the power to control, or other matter or transaction to which section 5 of the Act applies, becomes *imminent or apparent,* the opportunity will be available for all interested parties to interpose their opposition; yet this is the very matter that opposing parties have raised at this time, and the Commission has refused to grant a hearing to make the factual determination of whether such acts are imminent or apparent. Furthermore, the very use of this language indicates that the Commission must fully understand that it does have jurisdiction to prevent a party from entering into a transaction made unlawful by para-
[fol. 316] graph (4) of section 5 of the Interstate Commerce Act, and it need not sit idly by waiting until the final act of control is consummated. To take such a position would be tantamount to a court's refusing to take jurisdiction when a person seeks an injunction from bodily harm about to be committed against him, with the explanation, "Wait until the bodily harm takes place and we will then take the matter under consideration." Certainly, no one would argue that this is or should be the law, and yet this is the practical effect of the order of Division 3 dated March 15, 1965.

The order states that applicant urgently needs the proceeds of the sale of stock to acquire modernized terminals and equipment in order to keep operating costs at a reasonable level. Such a contention is not a valid reason or excuse for a violation, or a possible violation, of section 5 of the Interstate Commerce Act. Nor is there any way in which the Commission could make the decision that applicant urgently needs the proceeds for a program of modernization, until evidence has been received upon which such a finding could be based.

It should be noted that the only supporter of the application in Finance Docket No. 23324 is The Greyhound Cor-

poration, while opposition comes not only from various railroads which are owners of stock in R E A but also from bus systems, the American Trucking Associations, Inc., Regular Common Carrier Conference, several other trucking companies, and the Freight Forwarders Institute. In the face of this overwhelming opposition, the Commission has summarily granted the application and dismissed [fol. 317] the complaint of petitioner, Southern Pacific Company, without benefit of a hearing.

It is respectfully submitted that the granting of the application in Finance Docket No. 23324 and the granting of the motion to dismiss in Finance Docket No. 23374 are not based upon sound principles of law, and petitioner, Southern Pacific Company, urgently requests that this Commission reconsider its order of March 15, 1965, vacate such order, grant a hearing, and institute an investigation under section 5(7) to determine whether there has been a violation of section 5(4) of the Interstate Commerce Act.

Respectfully submitted,

Thormund A. Miller, Jeremiah C. Waterman, Charles W. Burkett, W. Harney Wilson, Attorneys for Petitioner, Southern Pacific Company.

San Francisco, Calif., April 12, 1965.

Certificate of Service (omitted in printing).

[fol. 318] [File endorsement omitted]

[fol. 319]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITION FOR RECONSIDERATION ON BEHALF OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—Filed April 15, 1965

Railway Express Agency (REA) filed an application on October 7, 1964, for authority under Sections 20(a) and 214 of the Interstate Commerce Act to issue 500,000 shares of common stock to be sold to The Greyhound Corporation (Greyhound) at a price of $20 per share. Several railroads (including Santa Fe), motorbus companies, motor carriers, trucking associations and the Department of Justice have intervened.

[fol. 320] Generally, the intervenors have taken the position that the proposed transaction would not be "compatible with the public interest" or "necessary or appropriate for or consistent with the proper performance" by REA of service to the public and that the acquisition of stock would give Greyhound the power to exercise control over REA in violation of Section 5(4). They have asked the Commission to institute an investigation pursuant to Section 5(7) and to hold public hearings on REA's Section 20(a) application. The Department of Justice has asked that the lawfulness of the proposed transaction under Section 7 of the Clayton Act be considered and has requested that a pre-hearing conference be held.

Although the proposed transaction would result in Greyhound being REA's largest single stockholder and despite the fact that the stock issue is coupled with avowed plans to consolidate the operations of REA and Greyhound in a common interest with a view towards ultimate stock con-

trol by Greyhound, Division 3 found that an investigation into the question of unlawful control would not be "appropriate at this time" and, contrary to its disclaimer, that Greyhound's stock ownership would not give it the power [fol. 321] to exercise control over REA. Division 3 also found, without the benefit of evidence and despite the contrary allegations of the intervenors, that the proposed transaction would meet the requirements of Section 20(a) and Section 214. It apparently was felt unnecessary to allow the intervenors an opportunity to support their allegations with evidence.

Protestant, The Atchison, Topeka and Santa Fe Ry. Co., hereby requests Division 3 in its appellate capacity to reconsider its findings and orders in this proceeding.

[fol. 322]

II.

Section 5

Division 3 has found that an investigation into whether the proposed transaction would give Greyhound the power to exercise control over REA contrary to Section 5(4) of the act "would not be appropriate at this time" and then has proceeded to find, somewhat inconsistently, that Greyhound's stock acquisition would not give it such power.*

> "*It further appearing*, That Greyhound offered to purchase a controlling stock interest, later offered to accept equal ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by repre-

* Division 3 disclaims the fact that it has made findings under any section of the act other than 20(a) and 214. However, it has found that the proposed transaction would not give Greyhound the power to control REA's board or at least that such power would not be "imminent" or "apparent". Furthermore, it has found that an investigation under Section 5(7) would not be "appropriate" and has found that the proposed transaction would be "compatible with the public interest" which certainly implies a finding that no violation of Section 5(4) would result from its consummation.

sentatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad stockholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that [fol. 323] 5 Greyhound directors would face 18 railroad directors divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York, C. & St. L. R. Co., Control,* 295 I.C.C. 703, (714)."

The protestant feels that the appropriate time to determine whether unlawful control would result from the proposed transaction would be—at least under the facts of this case where an opportunity for appropriate investigation exists—before that control has been obtained—not after. The mechanism for making an intelligent appraisal of the numerous claims that control would result is readily available in Section 5(7). But given the Division's finding that an investigation would not be appropriate, the protestant is at a loss to understand why it goes on to state that no control would result—and does so without the benefit of evidence.

[fol. 324] In finding that no unlawful control would be imminent or apparent, the Commission relies upon *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703. The disposition of that case demonstrates with striking clarity that Division 3 has acted improvidently in this case. There the Delaware, Lackawanna & Western applied for authority under Section 5(2) to acquire 14.8 percent of Nickel

Plate's common stock* and, concurrently, filed a motion to dismiss the application on the ground that the Commission lacked jurisdiction since no acquisition of control was involved. The Commission first held a hearing on the motion to dismiss. In ruling on the motion, the Commission made the following observations and findings all of which are directly applicable to the present proceeding.

"The control referred to in section 5 of the act does not require ownership of 51 percent of a corporation's voting stock. It is not to be determined by artificial tests, but is an issue of fact to be determined by the circumstances of each case. *Rochester Teleph. Corp.* v. *United States,* 307 U.S. 125, 144.

* * * * * * *

[fol. 325] "The interveners contend that the purpose of the applicant, if it places two directors on the Nickel Plate board, is to effectuate the control, or at least the management, of the Nickel Plate in common interest with the applicant. Under the provisions of section 5(4) this is unlawful unless authorized as provided in section 5(2), which is specific as to the nature of the transactions which the Commission may approve. Section 5(2) confers no authority on the Commission to approve management in a common interest through the use of common directors or officers unless coupled with control. *Chesapeake & O. Ry. Co. Purchase,* 271 I.C.C. 5, decided May 10, 1948. *If the factual evidence in the proceeding under consideration herein supports a finding of management in a common interest, it also would support a finding of control or the power to control or effectuate control of the Nickel Plate by the applicant.*"

* * * * * * *

"As previously indicated, control has no legal or technical meaning and is an issue of fact to be determined

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* A portion of this stock had been acquired prior to the filing of the application and motion to dismiss.

by the special circumstances of each case. While section 5(4) to (7), inclusive, and section 1(3)(b) indicate the broad outline of the type of transaction sought to be prohibited, or prohibited, unless approved by the Commission, it is left to the latter to judge for itself, *based on the record,* whether the facts warrant a conclusion that the transaction in question, having regard for the actualities of intercorporate relationships, will give a carrier power to exercise control or to participate in accomplishing or effectuating control of another carrier contrary to the act.

[fol. 326] "As heretofore indicated, regulatory commissions and the courts recognize that the amount of power and influence which may be wielded in corporate affairs in many cases is disproportionate to the stock ownership held by those exercising such power. In this case it is sufficient to find that the applicant is in a potential position to effectuate control and that the threat is imminent that control may be obtained and exercised contrary to the act. *It has been held that the law aims at the acquisition of controlling power and does not await an actual demonstration of such power. United States Freight Co.—Investigation of Control,* 39 M. C. C. 623 (636).

* * * * * * *

"*Preliminary findings.*—Predicated upon the facts and law stated herein we find:

"1. That the applicant in its application sets forth various steps which it will take toward partial unification of its properties and those of the Nickel Plate which, if accomplished, would be evidence of its control of the Nickel Plate.

* * * * * * *

"4. That it is generally recognized by the courts and regulatory bodies that a minority membership on a board of directors may, under certain circumstances, control the action of a board.

"5. That the power of the directors elected to the Nickel Plate board by the applicant would be enhanced because the latter is the former's largest stockholder."

* * * * * * *

[fol. 327] "7. That persons to be elected by the applicant to the Nickel Plate board would be affiliated with applicant and may be expected to give sympathetic consideration to its best interest even should that interest conflict with the interest of the Nickel Plate as an independent carrier.

"8. That the applicant acquired Nickel Plate stock not for investment but for the stated purpose of effecting a merger of the two companies, and no change in such purpose is indicated by this record.

"9. That there is little doubt but that the applicant will be working to effectuate control of the Nickel Plate and the record does not show that it will be unable to find the means."

* * * * * * *

"11. That the applicant's ownership of Nickel Plate stock, together with its election of two directors in that company, or possibly more, will place the applicant in a potential position to effectuate control and raise the imminent threat that such control may be obtained and exercised without the approval of this Commission.

"12. That we would not be warranted in disclaiming jurisdiction and finding that control could not be effectuated by the proposal herein when it is conceded by the applicant that the only difference between the presence or absence of the power to control or to effectuate control is in a state of the mind, or the existence or nonexistence of a 'psychology of power,' in the proposed directors." (295 I.C.C. at 141, 155-156, emphasis supplied.)

[fol. 328] The protestant submits that these observations and findings would be appropriate here but suggests that neither the intervenors, the applicant nor Division 3 can be certain unless a record is made.

After ruling on the motion to dismiss, the Commission set the *New York, C. & St. L.* case for hearing on the Section 5(2) application and also instituted an investigation into whether D, L & W's stock purchases had violated Section 5(4). The following language in the subsequent report shows that the Commission's conclusions necessarily were based upon facts of record—not upon an abstract consideration of pleadings:

> "The record and the pleadings in this proceeding are replete with the opposition and hostility of the Nickel Plate to any of the proposals made by the applicant to unify the companies, or to seat any of the applicant's representatives on the board of the Nickel Plate."
>
> * * * * * * *
>
> "The principal question for determination herein is whether such ownership of Nickel Plate stock by the applicant and the elective power it wields has violated or will violate the provisions of Section 5(4) of the Interstate Commerce Act, or Section 7 of the Clayton Act. We found in the prior report that applicant's [fol. 329] ownership of Nickel Plate stock, which would enable election of 2 or possibly 3 directors, would place applicant in a *potential position to effectuate control.* We also made a preliminary finding, among others, that the applicant acquired Nickel Plate stock not for investment but for the stated purpose of effecting a merger of the two companies and at that time no change in such purpose was indicated by that record.
>
> "The applicant's original intent has long been abandoned. It concedes that financially it is in no position to effect a merger of the carriers, nor could one be effected otherwise in view of the hostility of Nickel

Plate's management. Also, as heretofore indicated, applicant has trusteed its holdings by a trust agreement dated December 1, 1955."

* * * * * * *

"Similarly, in *Chesapeake & O. Ry. Co. Purchase,* 261 I.C.C. 239, we authorized, among other things, the acquisition by Alleghany Corporation of control of the Chesapeake & Ohio, the Nickel Plate, the Pere Marquette Ry. Co., and their subsidiaries. At the time of the decision, *Alleghany owned 7.92 percent of the outstanding stock and was in managerial control of the Chesapeake & Ohio by means of support of the other stockholders at elections of directors. Also see Finance Docket No. 19517, Canton R. Co. Control, 295 I.C.C. 822 (Not printed in full),* decided Jan. 29, 1957. The applicant, although the owner of approximately 15 percent of Nickel Plate's outstanding capital stock, has no managerial control over the Nickel Plate.

[fol. 330] "The Nickel Plate fears that, if the applicant elects 2 or possibly 3 strong directors on its board, they may sway the directors who are not so strong, and that their influence would be supported since they represent the holder of the largest single block of stock. There is always some likelihood that strong directors might sway the thinking of directors who are not so strong. *It is extremely doubtful, however, that 2 or 3 strong directors could overcome the unanimous opposition or hostility of 12 or 13 directors of the caliber normally holding such positions with a major railroad.* Certainly, the unanimous and hostile opposition of 12 or 13 directors could easily thwart the aims and desires of 2 or 3 directors. It has been held that the law aims at the acquisition of controlling power and does not await an actual demonstration of such power. *United States Freight Co.—Investigation of Control,* 39 MCC 623. Such control or

power to control, however, must be real and not based on conjecture or remote possibilities as is here indicated." (295 ICC at 713-714, emphasis supplied.)

Thus in *New York, C. & St. L. Ry. Co. Control,* the Commission first ruled on the basis of evidentiary facts that D., L. & W.'s proposal was within the scope of Section 5(2) because there was an intent to manage the companies in a common interest with a view towards ultimate unification and that minority representation on Nickel Plate's board by the largest single stockholder would put D., L. [fol. 331] & W. in a position to effectuate control. Subsequently, the Commission ruled, again on the basis of evidence that plans for unification had been abandoned and that the Nickel Plate's board was unanimously opposed to control by D., L. & W., that no violation of Section 5(4) had taken place.

The protestant feels that *New York, C. & St. L. R. Co. Control* demonstrates clearly the improper disposition of this proceeding by Division 3. It shows a) that a determination of whether a transaction such as that proposed here will result in the power to exercise control cannot be made in the abstract but must be based upon evidentiary facts, b) that the time to make that determination in cases such as the present one is before and not after control has been effectuated and, c) that board representation by the largest single stockholder, even though a minority representation, may result in the power to exercise control, especially when coupled with plans to manage the properties involved in a common interest with a view towards ultimate unification.

It may be noted that the only significant differences between the *New York, C. & St. L.* case and the present pro- [fol. 332] ceeding was the evidentiary showing there that plans for management in a common interest had been abandoned and that there was unanimous opposition to control by Nickel Plate's board. No such showing has been made

here. On the contrary, Division 3 recognizes the existence of plans for management in a common interest and ultimate unification. The endorsement of those plans by REA's board together with its authorization of filing the application involved here demonstrates that REA's board intends to be cooperative and to assist in the realization of those plans.

In *Chesapeake & O. R. Co. Purchase,* 271 I.C.C. 5, the Commission refused to authorize the release to the C&O of a 6.2 beneficial interest in the New York Central held in a voting trust since it would be "tantamount to sanctioning a violation of Section 5(4)." The basis of the Commission's decision was the fact that the *purpose* of the transaction was to enable the C&O to effectuate control or at least management in a common interest which would be unlawful absent Section 5(2) approval. The Commission stated, on page 14, that "one of the purposes for which it (the application) was brought was to effect an association between the New York Central and the Chesapeake & [fol. 333] Ohio in the belief that the community of interest between the two carriers would result great traffic benefits to both." Division 3 recognizes that the same purpose is involved here, yet it finds that no violation of Section 5(4) would result and does so without the benefit of evidence which could be obtained easily under Section 5(7).

The protestant submits that the Division's Section 5 findings are erroneous on their face, directly contrary to authority (especially the authority relied upon), and, in any event, are completely unsupported by evidence. Furthermore, Division 3's attempt to disclaim having made any findings under Section 5 is patently contradicted by its action with regard to the Section 5 allegations of the intervenors and its findings that the proposed transaction would be "compatible with the public interest" under Section 20(a) which, of necessity, implies that the transaction, if effected, would not violate Section 5(4).

[fol. 334] III.

Section 20(a)

Division 3 has found, in accordance with the requirements of Section 20(a), that REA urgently needs the proceeds to be derived from the stock issue,* that the price is fair and reasonable, that the stock issue is compatible with the public interest, and that the proposed transaction is necessary and appropriate. In making these factual determinations, Division 3 has concluded that a hearing is not necessary although numerous parties have challenged the assertions made in REA's application. While Section 20(a)(6) gives flexibility to the Commission in determining whether hearings shall be held on Section 20(a) applications, refusing to hold hearings or permit the introduction of evidence in this case, in which adjudicative facts are drawn into issue by the pleadings, constitutes a capricious abuse of that flexibility which deprives opposing parties of due process.
[fol. 335] In *Philadelphia Co.* v. *SEC*, 175 F.2d 808 (CA DC, 1948), the Court observed:

> "It is elementary in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except wherein each party shall have an opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment...."

In that case, the SEC was not bound by statute to hold a hearing or permit the introduction of evidence, and its action was to formulate a rule which would be "primarily

* Of course, the fact that REA may need capital has no bearing on the lawfulness of the proposed transaction nor is it relevant in determining whether the particular transaction proposed would be desirable.

applicable" to the complaining party. The reasons for holding a hearing in the present case are even stronger since the Commission's action is more clearly judicial in character than was that of the SEC in *Philadelphia Co.* v. *SEC.*

In *Atchison, T. & S. F. Ry. Co.* v. *U.S.*, 284 U.S. 248, the Supreme Court ruled that the Interstate Commerce Commission abused its discretion in failing to grant a petition for rehearing when facts intervening the hearing and the Commission's order had changed so as to make the Commission's [fol. 336] order unresponsive to prevailing conditions. The Court recognized that the Commission has no statutory duty to grant rehearings. However, the Court observed:

> "In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right." (284 U.S. at 262.)

In the present case the Commission is not required by statute to hold a hearing nor is it required to permit the introduction of evidence. However, adjudicative facts are in issue. Protestant submits that the Commission's refusal to grant a hearing on the facts of this case is not within the range of its discretion but constitutes a denial of right.

In *Hannah* v. *Larche*, 363 U.S. 440, the Supreme Court discussed the conditions under which administrative agencies must afford parties before them procedural due process:

> "Due process is an elusive concept. Its exact boundaries [fol. 337] are undefinable, and its content varies according to specific factual contexts. *Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the*

procedures which have traditionally been associated with the judicial process." (363 U.S. 420, emphasis supplied.)

These circumstances are present in the instant proceeding.

The protestant submits that Division 3 erred in making factual determinations without the benefit of evidence and in refusing to grant intervenors the opportunity to test the applicant's assertions on cross-examination or to present contrary evidence.

IV.

Conclusion

For the reasons stated above, the protestant requests Division 3, in its appellate capacity, to reconsider the orders issued in this proceeding, to institute an investigation pursuant to Section 5(7) into whether the proposed transaction will result in a violation of Section 5(4) and to set [fol. 338] for hearing REA's application for authority to issue securities.

Respectfully submitted,

Starr Thomas, S. R. Brittingham, Jr., C. George Niebank, Jr., Milton E. Nelson, Jr., 80 East Jackson Boulevard, Chicago 4, Illinois, Attorneys for Protestant.

Due Date: April 15, 1965.

Certificate of Service (omitted in printing).

[fol. 339]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

PETITION FOR RECONSIDERATION BY THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—Filed April 15, 1965

Comes now petitioner and intervening protestant herein, The Denver and Rio Grande Western Railroad Company, and respectfully petitions the Interstate Commerce Commission for reconsideration of its order in Finance Docket No. 23324, dated March 15, 1965. As grounds for this petition for reconsideration it is alleged and stated as follows:

I.

The Denver and Rio Grande Western Railroad Company heretofore timely filed its petition for leave to intervene and protest to the application of Railway Express Agency, Incorporated. Petitioner's interest herein is by virtue of its ownership of 12,456 shares of the common stock of applicant, Railway Express Agency, Incorporated.

II.

By order dated March 15, 1965, served March 16, 1965, Division 3 of the Interstate Commerce Commission au-
[fol. 340] thorized Railway Express Agency, Incorporated, to issue not exceeding 500,000 shares of common stock at a par value of $1.00 each to be sold to the Greyhound Corporation at a price of $20.00 per share. This order grants relief requested in the application filed October 7,

[File endorsement omitted]

1964, assigned Financial Docket No. 23324 as last supplemented November 7, 1964. In addition, the complaint filed by Southern Pacific Company in Finance Docket No. 23374 was dismissed upon the erroneous grounds that the Commission had no jurisdiction to prevent a party from entering into a transaction made unlawful by paragraph (4) of Section 5 of the Interstate Commerce Act. Said order was summarily granted with no hearing held in either proceeding.

III.

The Commission erred in finding that the proposed sale is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company and a common carrier by motor vehicle and that such sale is reasonably necessary and appropriate for such purpose. In effect the Commission found that there was no possibility of control or power to control by the sale of 500,000 shares of stock but such finding was made without considering the effect of Greyhound's position that it would not enter the transaction without the condition precedent that Greyhound agreed to purchase 1,000,000 shares of stock from present shareholders and Railway Express Agency, Incor- [fol. 341] ported. Objections to the transaction filed by protestants cannot be passed off as mere conjecture or remote possibilities without a hearing to develop the true facts. Truly by the consummation of this transaction as proposed by the application Greyhound holds more than a mere option to control Railway Express Agency, Incorporated, it has in fact agreed to purchase control.

IV.

The decision of March 15, 1965, is inconsistent by stating that in the future interested parties may interpose their objections to this transaction if control becomes imminent

or apparent, whereas the order by the Commission in and of itself gives Greyhound the right to control.

Wherefore, said petitioner and intervening protestant prays that the Commission reconsider its order herein dated March 15, 1965, revoke it and set the application for hearing in a consolidated proceeding on the complaint of Southern Pacific Company and thereafter the application be denied.

Respectfully submitted,

T. A. White, Royce D. Sickler, Attorneys for Petitioner, The Denver and Rio Grande Western Railroad Company, Box 5482, Denver, Colorado 80217

Dated this 12th day of April, 1965.

[fol. 342] Certificate of Service (omitted in printing).

[fol. 343] [File endorsement omitted]

[fol. 344]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 23324

[Title omitted]

PETITION OF AMERICAN TRUCKING ASSOCIATES, INC., REGULAR COMMON CARRIER CONFERENCE, AND MOTOR COMMON CARRIERS FOR RECONSIDERATION—Filed April 15, 1965

Come now American Trucking Associations, Inc. (ATA), Regular Common Carrier Conference (Conference), and Denver Chicago Trucking Company, Consolidated Freightways Corporation of Delaware, Missouri Consolidated Freightways Corporation, Illinois-California Express, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Ex-

press Co., Transcon Lines, Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., Western Gillette, Inc., Interstate Motor Lines, Inc., T.I.M.E. Freight, Inc., and Consolidated Copperstate Lines, and file this petition for reconsideration of the order, served March 16, 1965, of division 3, and as grounds therefor state:

I

Statement of Case

By application filed October 7, 1964, Railway Express Agency, Incorporated (Railway Express), seeks authority under sections 20a and 214 of the Interstate Commerce Act to issue 500,000 shares of common stock, par value $1 per share, to be sold to The Greyhound Corporation (Greyhound) at a price of $20 per share. As a condition prece- [fol. 345] dent to Railway Express's agreement to sell the 500,000 shares, Greyhound had to offer to buy an additional 1,000,000 shares of its outstanding stock. Railway Express's charter authorizes it to issue 2,576,000 shares of common stock, of which 1,999,188 shares are outstanding and owned by 60 railroads. The proposed issuance of the 500,000 shares of stock will thus bring Railway Express's total outstanding shares of stock to 2,499,188. Should Greyhound acquire the 500,000 shares, 20 percent of Railway Express's stock, and succeed in buying the 1,000,000 additional shares from the railroads, it would then own 60 percent of Railway Express's stock and control the company.

ATA, Conference, 12 motor common carriers, National Trailways Bus System, 17 motorbus companies, Freight Forwarder Institute, and 5 railroad stockholders of Railway Express filed petitions with the Commission for leave to intervene in opposition to the application, and Greyhound filed a petition for leave to intervene in support of the application. Besides protesting the application we

sought, as did several other opposing intervenors, to have the Commission consider Railway Express's application under section 5 of the Act.

A petition for leave to intervene was also filed by the Department of Justice, requesting the Commission to institute a proceeding to determine the lawfulness of the stock transaction under section 7 of the Clayton Act, and to consolidate Railway Express's application to issue the 500,000 shares of common stock for consideration with such a proceeding. And Southern Pacific Company, an opposing railroad stockholder, filed a complaint asking the Commission to invoke the provisions of section 5(7) of the Act and, after hearing and investigation, to require Railway Express to cease and desist from consummating the proposed transaction.

Railway Express replied to the protests and petitions for leave to intervene in opposition to its application, urg- [fol. 346] ing primarily that its application be approved without further proceedings. In addition, Railway Express and Greyhound filed motions to dismiss and answers to the complaint of the Southern Pacific Company. Southern Pacific Company, in turn, replied to the motions to dismiss. The Commission granted all the petitions for leave to intervene.

By order served March 16, 1965, division 3 found that the issuance of the 500,000 shares of common stock was lawful under sections 20a and 214, authorized Railway Express to issue the shares of stock, and provided an effective date 35 days from the date of service of the order. Division 3 summarily rejected intervenors' arguments in opposition to the application and found further that a hearing was not appropriate at this time to investigate whether the transaction might violate the provisions of section 5 of the Act and section 7 of the Clayton Act. It dismissed the complaint filed by the Southern Pacific Company.

II

Division 3 Erred in Granting Railway Express's Application to Issue Its Stock Without Holding a Hearing to Determine Whether the Issuance of Such Stock is Lawful Under Sections 20a, 214, and 5

Section 20a provides in part that the Commission shall authorize the issuance of securities by a carrier such as Railway Express only if it finds that such issue: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate [fol. 347] for such purpose.[1]

In our petitions for leave to intervene and protests, we asked that a hearing be held in this proceeding to determine whether the issuance of stock conforms to the statutory requirements of sections 20a and 214, and to explore the question of control of Railway Express, implicit in the application. As noted previously, division 3 denied our request for a hearing and granted the application solely on the basis of the pleadings. It is our position that division 3 erred in granting the application without holding a hearing so that all the circumstances and details regarding the proposed transaction could be established. It is our position further that division 3 has decided this proceeding, one of general transportation importance, on an incomplete record, and that opposing intervenors have been denied a fair opportunity to present their case in opposition to the application.

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[1] Section 214 provides, as pertinent here, that the issuance of securities by carriers subject to part II shall be subject to the provisions of section 20a. It is, therefore, the requirements of section 20a which must be met by Railway Express to warrant a grant of its application.

This proceeding does not involve a routine request by a carrier for authority to issue 500,000 shares of its authorized but unissued shares of common stock. Railway Express's proposed stock issuance is but one part of a single agreement between Railway Express and Greyhound whereby Greyhound has offered to buy control of Railway Express from the railroads. The circumstances and details of a transaction of this magnitude certainly cannot be presented in the form of pleadings. Oral hearing is essential for a full disclosure of all the relevant facts. Thus division 3, in failing to hold such a hearing, has deprived itself of a complete record.

It was impossible, moreover, for division 3 to apply properly the standards of section 20a without a hearing. This is [fol. 348] so for two reasons. First, our petitions for leave to intervene and protests were designed only to show our interest in this proceeding, and to alert the Commission that there was presented here a question as to whether the issuance of stock was for a lawful purpose. Although we alleged in our pleadings, as did other opposing intervenors, that the proposal was unlawful, we did not present in detail the grounds to support our allegations, and nothing in the Commission's General Rules of Practice required us to do so. Rather, we fully expected that the Commission would set the application for hearing, at which time we could have shown specifically how the proposal violates the Act. The division, in deciding that the application should be granted without a hearing, has accordingly deprived us of a fair opportunity to indicate in what manner the proposal does not meet the requirements of section 20a. In doing so, we submit it has also failed to give full consideration to the standards of section 20a, because the extent to which the issuance is not in compliance with that section has never been presented to it for consideration.

Furthermore, whether the proposal is in the public interest, as required by section 20a, plainly cannot be resolved without a hearing. To illustrate, Railway Express operates

pursuant to an operating agreement with the railroads which has been approved by the Commission. Since Railway Express is wholly owned by the railroads, the Commission apparently deems it to be in the public interest to permit Railway Express and the railroads, under this agreement, to pool traffic and revenues, and for Railway Express to pay the railroads only their out-of-pocket costs when using them as its underlying carriers. Whether it will continue to be in the public interest to permit this arrangement should Greyhound acquire control of Railway Express, or a substantial interest in the company, is a question which cannot be answered without a hearing.

[fol. 349] It must be decided, too, whether it is in the public interest to permit Greyhound, the nation's second largest transporter of express traffic, to acquire control of Railway Express, the largest transporter of express traffic, since such control would give Greyhound a virtual monopoly of the country's express traffic. And if Greyhound should acquire less than a majority interest in Railway Express, it still would have a sufficient equity interest to enter into mutually advantageous agreements, the result of which would be to substantially lessen competition.

From the foregoing it is plain that the myriad questions raised by the instant application are such that only by holding a hearing to develop a comprehensive record can they be resolved correctly.

To sum up, the regulated motor carrier industry is greatly interested in the outcome of this proceeding because regulated motor corriers are gravely threatened by Railway Express's program of expansion into the general trucking field. We fear that if the proposed transaction is consummated, the combination of Greyhound's and Railway Express's vast financial resources and nationwide operating facilities will enhance Railway Express's competitive position and stimulate further its campaign to become a general freight carrier. It is vital, therefore, that oral hearing be held to afford an opportunity to show that the transaction under consideration is not in the public interest

and is otherwise unlawful. Thus, we urge that it was error to grant the application without holding a hearing, that the order granting the application should be vacated, and the application set for hearing.

III

Division 3 Erred in Finding That the Proposed Transaction Would Not Result in Greyhound's Acquiring Control of Railway Express

Division 3 found that the instant transaction would not [fol. 350] result in Greyhound's acquiring control or power to control Railway Express. It based its findings upon the fact that the involved 500,000 shares of stock represents only a 20 percent interest in Railway Express, and the allegation that representatives of dissident railroad stockholders had indicated that Greyhound would not acquire one share under its offer to buy up to 1,000,000 additional shares, since all outstanding stock is subject to their right of first refusal. It was also of the opinion that the make-up of Railway Express's board of directors prevented Greyhound from acquiring control of Railway Express. This is for the reason that the 500,000 shares of stock would enable Greyhound to elect only 5 directors at-large, and they would supposedly face 18 railroad directors divided into three voting blocks, each having as many votes as Greyhound. It is unlikely, according to division 3, that those 5 Greyhound directors could sway the thinking of 8 railroad directors so as to enable Greyhound to acquire control of Railway Express. But these are all suppositions based on untested hypotheses, which do not meet applicant's burden of proof.

It is well-settled that whether one company has acquired control of another is an issue of fact to be determined by the special circumstances in each case. *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125. Thus whether Greyhound's acquisition of a 20 percent interest in Railway Express will result in its acquiring control of Railway Ex-

press or not, is a factual question. Although it is difficult to answer this question because of the incomplete record in this proceeding, there is nevertheless sufficient evidence to refute division 3's finding that Greyhound would not acquire control of Railway Express should it acquire the 500,000 shares of stock.

If Greyhound succeeds in obtaining the 500,000 shares of stock from Railway Express, it will be, with a 20 percent [fol. 351] interest, the largest single stockholder of Railway Express. The Commission has recognized control to exist with ownership of less than 10 percent of the outstanding voting stock. *Louisville & J. B. & R. Co. Merger*, 290 I.C.C. 725. See also, *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61. But, aside from the percentage of stock ownership Greyhound would hold, it must be kept in mind that Greyhound is not buying such stock merely for investment purposes; it expects to consolidate its facilities with those of Railway Express and to provide an improved service. It can hardly be supposed that management as astute as Greyhound's is going to spend a large sum of money in acquiring stock and in integrating its facilities with Railway Express, unless it expects to control Railway Express outright or it has been assured that it will be able to influence strongly Railway Express's operations.

As to the division's finding that, because of the preponderance of railroad directors and block voting, it was unlikely that Greyhound could control Railway Express, we submit that such a conclusion is unsound. The decision falsely assumes that the railroad stockholders will stand shoulder to shoulder and vote as a unit. There is nothing in the record to suggest that the railroads will vote as a unit, let alone against Greyhound. On the contrary, since over 80 percent of the railroad stockholders voted to accept Greyhound's offer to buy control of Railway Express, it is reasonable to expect that a majority of such stockholders would support Greyhound's managerial aims, and that they would vote in support of its policies. Thus even though Greyhound would be a minority stockholder, it is

possible for it to control Railway Express by virtue of the acquiescence of sympathetic railroad owners of a substantial amount of Railway Express stock.[2] And that this is [fol. 352] likely to happen is buttressed by the opposition of the dissident railroads, which allege in their pleadings that the instant proposal will result in Greyhound's acquiring control of Railway Express. Since those railroads were parties to the confidential discussions of the board of directors of Railway Express concerning the proposed transaction, their statements and opposition should be accorded great weight.

All in all, we submit that whether Greyhound will actually acquire control of Railway Express through the transaction now before the Commission cannot be resolved accurately on the basis of the information so far made available to division 3. Oral hearing obviously is necessary to determine the true situation.

Prayer

For the reasons stated, ATA, Conference, and motor common carriers respectfully request that division 3 vacate its order, served March 16, 1965, granting the application of Railway Express to issue 500,000 shares of its common stock, and that it order this proceeding to be set down for hearing in order to determine whether the proposed issuance is in fact in conformity with the requirements of sections 20a, 214, and 5 of the Act, Congress's national transportation policy, and section 7 of the Clayton Act.

[fol. 353] Respectfully submitted,

Denver Chicago Trucking Company, Inc., Consolidated Freightways Corporation of Delaware, Missouri Consolidated Freightways Corporation, Illinois-California Express, Inc., Navajo Freight Lines, Inc., Pacific Inter-

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[2] Cf., *Abramowitz—Investigation of Operations*, 94 M.C.C. 213; *Furniture Forwarders, Inc., F.F. Application*, 316 I.C.C. 615; and *Colletti—Control—Comet Freight Lines*, 38 M.C.C. 95.

mountain Express Co., Transcon Lines, Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., Western Gillette, Inc., Interstate Motor Lines, Inc., T.I.-M.E. Freight, Inc., Consolidated Copperstate Lines, David Axelrod, Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603, Eugene T. Liipfert, 1035 Universal Building North, Washington, D. C. 20009.

American Trucking Associations, Inc., Peter T. Beardsley, William R. Rubbert, Harry J. Jordan, Paul D. Borghesani, Richard R. Sigmon, 1616 P Street, N. W., Washington, D. C. 20036.

Regular Common Carrier Conference, R. Edwin Brady, 1616 P Street, N. W., Washington, D. C. 20036, Roland Rice, Rice, Carpenter and Carraway, 618 Perpetual Building, Washington 4, D. C.

Certificate of Service (omitted in printing).

[fol. 354] Service Date April 21, 1965

INTERSTATE COMMERCE COMMISSION

Washington, D. C.

Finance Docket No. 23324

[Title omitted]

Finance Docket No. 23374

[Title omitted]

Order of March 15, 1965

NOTICE TO THE PARTIES—April 16, 1965

The outstanding order in the above-entitled proceedings not yet having become effective, and petitions for reconsideration of such order having been filed on or before April 15, 1965, in Finance Docket No. 23324, by inter-

veners, American Trucking Associations, Inc., Freight Forwarders Institute, The Atchison, Topeka and Santa Fe Railway Company, The Denver and Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company, Southern Pacific Company, and Transcontinental Bus System, Inc., et al., and in Finance Docket No. 23374, by complainant, such order is, pursuant to section 17(8) of the Interstate Commerce Act, stayed pending disposition of the matter.

Bertha F. Armes, Acting Secretary.

[fol. 355] [File endorsement omitted]

[fol. 356]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Washington, D. C.

Finance Docket No. 23324

[Title omitted]

Finance Docket No. 23374

[Title omitted]

REPLY OF RAILWAY EXPRESS AGENCY, INCORPORATED, TO ALL PETITIONS FOR RECONSIDERATION OF THE ORDER OF DIVISION 3 SERVED ON MARCH 16, 1965—Filed April 30, 1965

On October 7, 1964, Railway Express Agency, Incorporated ("REA") initiated this proceeding by filing with the Interstate Commerce Commission an application (assigned Finance Docket No. 23324) under Sections 20a and 214 of the Interstate Commerce Act for authority to issue 500,000 shares of REA's Common Stock, par value $1 per share, to The Greyhound Corporation ("Greyhound") pursuant to the terms and conditions set forth in the application. [fol. 357] Subsequently, various parties filed petitions to

intervene in this proceeding and requested a hearing and other proceedings, and Southern Pacific Company filed a complaint against REA and Greyhound (assigned Finance Docket No. 23374) under Section 5 of the Interstate Commerce Act. By order of Division 3 dated March 15, 1965, and served on March 16, 1965 ("the Division 3 Order"), Division 3 found that the proposed stock issue by REA satisfied the standards set forth in Sections 20a and 214* of the Interstate Commerce Act, authorized the proposed issue pursuant to Section 20a, denied the petitions of intervenors for a hearing and other proceedings and dismissed the complaint in Finance Docket No. 23374. Prior to the effective date of the Division 3 Order, petitions for reconsideration thereof were filed by the intervenors listed in Part II of the Appendix to the Division 3 Order and, pursuant to Section 17(8) of the Interstate Commerce Act, the Division 3 Order was stayed pending disposition of such petitions for reconsideration.

REA files this Reply to all Petitions for Reconsideration to show that the Division 3 Order was correct as a matter of fact, as a matter of law and as a matter of administra- [fol. 358] tive discretion. Division 3 correctly found that the proposed stock issue satisfies the standards set forth in Section 20a of the Interstate Commerce Act, which finding is amply supported by the record in this proceeding. Division 3 properly denied as premature the petitions to conduct an investigation under Section 5 of the Interstate Commerce Act and to consolidate this Section 20a proceeding with a proceeding under Section 5 of the Interstate Commerce Act and/or Section 7 of the Clayton Act. Division 3 properly denied, pursuant to express statutory authority, the various petitions for a hearing in this Section 20a proceeding and such denial of hearing has not injured the intervenors.

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* For the sake of brevity, Sections 20a and 214 of the Interstate Commerce Act will be hereinafter collectively referred to as "Section 20a".

The petitions for reconsideration of the Division 3 Order are without merit and should be denied, and the Division 3 Order should be permitted to become effective as soon as possible.

I.

Division 3 Correctly Found That the Proposed Stock Issue Satisfies the Standards of Section 20a of the Interstate Commerce Act.

The only issue properly before the Interstate Commerce Commission in this proceeding is whether the proposed stock issue by REA

> (a) is for some lawful object within REA's cor- [fol. 359] porate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by REA of service to the public as a common carrier, and which will not impair its ability to perform that service, and
>
> (b) is reasonably necessary and appropriate for such purpose.

The object of the proposed stock issue and the reasons why such issue satisfies the standards set forth in Section 20a were set forth under oath by REA in its application and supporting documents filed herein. On the basis of that record, Division 3 stated, in the Division 3 Order, that

> *"It further appearing,* That applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is

fair and reasonable; and that the expenses of the issue are estimated at $15,000.

". . .

"*It further appearing,* and the said Division so finds, that the proposed issue by Railway Express Agency, Incorporated, of not exceeding 500,000 shares of common stock of the par value of $1 each as aforesaid (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public [fol. 360] as an express company and a common carrier by motor vehicle, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

". . .

"*It is further ordered,* That Railway Express Agency, Incorporated, be, and it is hereby, authorized to issue not exceeding 500,000 shares of common stock of the par value of $1 each, to be sold to a non-railroad corporation at a price of not less than $20 per share."

Those findings of Division 3 are amply supported by the record made in this proceeding and should not be disturbed.

The proceeds of $10,000,000 from the issuance of 500,000 shares of Common Stock of REA will be applied by REA for the purpose of (a) reimbursing REA in part for cash expenditures made from retained earnings of REA for additions and betterments or other capital expenditures, and (b) to provide funds for required additional capital expenditures to be made by REA in the future. The issuance and sale of the 500,000 shares of Common Stock of REA will also have the effect of bringing about a more normal balance between REA's funded debt and its capital stock and this improved relationship will be of benefit to REA in financing its future requirements.

REA had no retained earnings until July of 1961, when the Standard Express Operations Agreement between REA and the railroad carriers parties thereto was amended to [fol. 361] put REA on a profit and loss basis. In 1960, REA began a capital improvement program; prior to that time, REA had either leased the major portion of its facilities or used facilities owned by other carriers. From 1960 through August 20, 1964, REA expended a total of $16,936,938 for capital expenditures in connection with the acquisition and modernization of terminals. During the same period REA borrowed for such purposes a total of $8,500,000 and thus was required to finance from internally generated funds (*e.g.*, earnings, depreciation, etc.) the balance of such capital expenditures, namely, $8,436,938, plus the payments on that portion of the loans repaid. In view of REA's short history of profitable operations, it has not, of course, been easy for REA to effect this long overdue capital improvement program.

The additional capital expenditures required to complete the unfinished terminal projects referred to in the preceding paragraph are estimated at $3,536,289. Moreover, as set forth in Exhibit 3 to REA's application herein, in addition to the fiscal 1965 automotive program, REA's anticipated capital expenditures on new terminal projects for the fiscal year July 1964-June 1965 are in excess of $14,000,000.

[fol. 362] The proceeds of the issuance of Common Stock by REA will be of immeasurable assistance to REA in financing its capital program and will be applied thereto. Such areas of expenditure are obviously crucial to maintaining and improving REA's service to the public as an express company, yet it appears that retained earnings will not provide sufficient capital to permit REA to make such expenditures and comparable expenditures in future years without borrowings. Such borrowings will be increasingly difficult if REA does not improve its debt to equity ratio. As can be seen from the financial statements submitted by

REA herein, REA's total equity and surplus are approximately $10,000,000 and REA's debt to equity ratio is approximately 7 to 1. Addition of the $10,000,000 proceeds of the proposed stock issue to REA's equity would obviously, in and of itself, improve substantially REA's financial position.

The foregoing facts are a part of the record of this proceeding and have been recited herein briefly by REA merely to illustrate that there is more than an adequate basis in the record in this proceeding for the finding in the Division 3 Order that the proposed stock issue satisfies the standards of Section 20a of the Interstate Commerce Act. Significantly, none of the intervenors has seen fit to challenge the facts sworn to by REA in its application herein. In [fol. 363] fact, the intervenors do not appear seriously to question that the proposed stock issue will be of benefit to REA; their concern is with the benefit of the proposed stock issue to the purchaser of the stock (which, as hereinafter discussed, is irrelevant in this Section 20a proceeding).

II

Division 3 Properly Deferred as Premature the Petitions of Intervenors for Investigation of Their Allegations That the Proposed Stock Issue Would Result in Harmful Effects Upon Competition and "Control" of REA by Greyhound.

Division 3 properly denied the petitions of intervenors for an investigation of their allegations that the proposed stock issue would result in harmful effects upon competition and in "control" of REA by Greyhound. The questions of effect upon competition and control are not only irrelevant in this Section 20a proceeding but are premature in respect of all other aspects of this case, for the proposed stock issue, in and of itself, could not result in harmful effects upon competition or in control of REA by Greyhound.

A. Questions of effect upon competition and "control" are irrelevant in this Section 20a proceeding.

Under Section 20a, the jurisdiction of the Commission is [fol. 364] limited to an investigation of whether a proposed issue will maintain or improve the proper performance *by the applicant* of service to the public as a common carrier. The purpose of Section 20a is to protect an issuing carrier against jeopardizing its ability to render service to the public through improvident security issues. It is not the purpose of Section 20a to regulate "to whom" securities are issued by carriers.

That the jurisdiction of the Commission under Section 20a is limited to the effect of the proposed stock issue upon the issuing carrier and to the maintenance of the integrity of carrier securities is borne out by the legislative history of Section 20a and judicial decisions interpreting it:

> "The dominant purpose of the financial provisions of Section 20a is to maintain a sound structure for support of railroad credit through aid in developing a national transportation system. Indirectly, these provisions were also designed to protect the investing public against faulty or dishonest financing which could result in dissipation of railroad resources and thus to promote confidence of investors in railroad securities." *Chicago S. Shore & S. Bend R. R.* v. *United States,* 221 F. Supp. 106 (108). See Sharfman, *The Interstate Commerce Commission,* Vol. I, 189-195.

That the jurisdiction of the Commission under Section 20a is not broad enough to encompass the issues posed under Section 5 of the Interstate Commerce Act was admitted in the petition dated October 21, 1964, of intervenors Transcontinental Bus System, Inc., *et al.,* to requiring filing under [fol. 365] Section 5, Interstate Commerce Act, and to consolidate, wherein the following appears:

> *"The acquisition by Greyhound of 20% of R.E.A.'s common stock would not normally be considered as con-*

trol, but, such acquisition does present a serious question, to-wit: 'Whether Greyhound should be allowed to consolidate its facilities and operations with those of R.E.A.' A proper determination of this question will require the presentation and consideration of broad issues—issues pertaining to the National Transportation Policy. *The issues pertinent under Sections 20a and 214 are limited and narrow and are insufficient for this purpose.*

"... *Unlike Sections 20a and 214,* Section 5 does allow, and in fact makes specific provision for, the presentation of the issues necessary for a determination of the question as to whether or not Greyhound should be allowed to consolidate its facilities and operations with those of R.E.A." (Emphasis supplied.)

Division 3 denied such petition to require a filing by Greyhound and REA of an application under Section 5, stating in the Division 3 Order: "That the filing of an application under section 5 of the act is permissive and may not be required by us, see *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122 (127)".

Intervenor Southern Pacific Company, in its petition for reconsideration, challenges that portion of the Division 3 Order as follows:

"The cited case does not so hold, but merely points out that the *consummation* of a transaction, whether approved in its original form or as modified by the Commission, is permissive and not mandatory."

REA submits that the citation by Division 3 to the *Seaboard* [fol. 366] case was proper. The *Seaboard* case does state that the consummation of a transaction involving a merger is permissive and not mandatory, as intervenor Southern Pacific Company states. But the *Seaboard* case further declares—and it was for this that Division 3 cited it—that Section 5 of the Interstate Commerce Act gives to carriers

"the initiative to formulate and present for our approval specific merger proposals". *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.*, 320 I.C.C. 121, 127 (1963). That the Commission was speaking of merger applications in the *Seaboard* case is not significant. The point is that applications under Section 5 of the Interstate Commerce Act—whether for merger or control—must originate with the parties and cannot be compelled by the Commission. The abortive attempt of Congress to entrust the Commission with the task of compelling railroad mergers and consolidations was abandoned in the Transportation Act of 1940 when Section 5 was enacted in its present form. That "the Commission has no power to require the filing of an application under section 5" was admitted in the petition for reconsideration dated April 15, 1965, filed herein by Freight Forwarders Institute.

Finally, it should be noted that the Division 3 Order does not purport to authorize to whom the proposed stock issue is to be made. The Division 3 Order states that REA is authorized to issue not exceeding 500,000 shares of its [fol. 367] common stock of the par value of $1 each, "to be sold to a non-railroad corporation". REA submits that this is an indication of the proper scope of the Commission's jurisdiction under Section 20a.

B. The proposed stock issue will not produce an effect upon competition.

There certainly can be no basis for the assertion that the mere issuance by REA of the stock which is the subject—and the only subject—of this proceeding will produce an effect upon competition. As to the future, it is true that REA and Greyhound *may* make a study of, and possibly effect, certain economies. As the resolution adopted by the Board of Directors of REA states, however, this is only an "intention" and even this "intention" is conditioned in the resolution on such economies being "lawful". The purchase by Greyhound of a $10,000,000 interest in REA cannot in itself be a violation of Section 7 of the Clayton Act

or result in an effect on competition. If any "economies" are made in the future which any party aggrieved considers "unlawful", such party will have an adequate forum at that time to challenge them.

The United States Justice Department, which filed a petition herein requesting the Commission to conduct an investigation under Section 7 of the Clayton Act, has not [fol. 368] requested reconsideration of the Division 3 Order denying such petition. Such failure to petition for reconsideration is significant in view of the Justice Department's strong position on the need to enforce Section 7 of the Clayton Act whenever an effect upon competition is threatened. REA submits that such failure to file a petition for reconsideration can only be explained by the acceptance by the Justice Department of the facts that (a) the proposed stock issue does not, in and of itself, raise any question of an effect upon competition and (b) should REA and Greyhound in the future ever consolidate services or facilities to an extent deemed unlawful by the Justice Department, the Justice Department will be free to move at that time against REA and Greyhound under Section 7 of the Clayton Act or any of the other antitrust laws.

C. The proposed stock issue will not give Greyhound control of REA.

Division 3 stated, in the Division 3 Order:

> *"It further appearing,* That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws as amended,

would not permit Greyhound to control the board; that [fol. 369] 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703 (714)".

The foregoing statements by Division 3 are correct and are amply supported by the record in this proceeding. In the fact of such facts, the petitions for reconsideration which allege that the proposed stock issue will give Greyhound control of REA must be dismissed as frivolous. REA submits that Division 3's conclusion that the proposed stock issue will not give Greyhound control or power to control REA may be supported by at least the following reasons:

First, the 20% interest to be acquired by Greyhound is, of course, a minority interest which in and by itself will not permit control or the power to control.

Secondly, the By-laws of REA, as amended, provide that 18 out of the 25 directors of REA are to be nominated by the railroad stockholders and that only 20% of the directors (or 5 of the 25 directors) may be nominated by Greyhound. The other two directors are nominated by management.

In that connection, the history of REA must be remem- [fol. 370] bered. Throughout the existence of REA it has been controlled by railroads who have owned all the stock of REA and, through the Standard Express Operations Agreement, supplied REA with rail transport and shared in REA's profits and losses. The acquisition of stock and

representation on the Board by a non-railroad stockholder —the first such stockholder in the history of REA—will not change the fact of railroad control.

In addition, the remaining stock of REA will not be completely scattered amongst small shareholders. There are only 60 stockholders of REA, all of which are railroad companies and some of which hold substantial interests.

It is also important to realize that representation on REA's Board is allotted by REA's Charter and By-laws to three railroad districts as follows: the Eastern District (which holds 1,085,748 shares of REA) with the right to nominate 7 directors, the Western District (which holds 633,180 shares of REA) with the right to nominate 6 directors and the Southern District (which holds 280,260 shares of REA) with the right to nominate 5 directors. The railroad company stockholders of REA are thus consolidated for voting purposes into three blocs for election of the Board, each of which has the right to nominate at least as many directors as Greyhound under the By-laws. It is [fol. 371] also important to remember that such method of electing directors to the Board of REA may not be changed without the vote of two-thirds of the stock issued and outstanding.

In summary, therefore, it is clear that the acquisition by Greyhound of 20% of the stock of REA will give to Greyhound a 20% investment in REA and nothing more. Greyhound will not have the power to elect more than 20% of the Board of REA and will not be able to compel changes in the Standard Express Operations Agreement or in the Charter or By-laws of REA or in REA's methods of operations. In no practical sense, therefore, could Greyhound be said to control or have the power to control REA. In the face of such facts, Division 3 correctly concluded that "control or power to control must be real and not based on conjecture or remote possibilities, *New York, C. & St. L. R. Co. Control*, 295 I.C.C. 703 (714)." Even the Justice Department in its petition to intervene in this proceeding admitted that it "does not at this time take the position that the transaction will result in such control".

Several of the intervenors have alleged that the "Nickel Plate" case cited by Division 3 does not support the Division 3 Order but rather suggests that the acquisition of 15% of a carrier's stock, plus the right to elect two or three out of 15 directors, constitutes control. On closer examination, however, it will be seen that the *Nickel Plate* case does [fol. 372] in fact support the Division 3 Order. In the *Nickel Plate* case, not only did the acquiring carrier own more stock than the next six largest stockholders combined, but the acquiring carrier admitted that such stock was acquired with the intent to merge. Those facts are obviously not present in this proceeding.

Several of the petitions for reconsideration raise again the issue of possible control of REA by virtue of Greyhound's offer to acquire 1,000,000 additional shares of REA stock from REA stockholders. The answer to that allegation remains the same as before: Greyhound does not and will not have the *right* to purchase *any* stock from REA stockholders; Greyhound has agreed—at the insistence of REA—to accept tenders of up to 1,000,000 shares from REA stockholders, subject to the right of first refusal in other stockholders and to all necessary governmental approvals. In fact, the railroad stockholders of REA filing petitions for reconsideration herein have it in their power to prevent Greyhound from purchasing any stock from REA stockholders and the representatives of certain railroad stockholders have repeatedly stated their intention to do so. Whether additional purchases, if any, of REA stock by Greyhound will in the future give Greyhound control of REA is a question not presented by this application and Division 3 wisely refused to be drawn into a consideration [fol. 373] of such premature, conjectural issues.

There is a suggestion in several of the petitions for reconsideration that control will result from the proposed stock issue because of collusion between several of the railroads and Greyhound. There are no facts alleged in such

petitions for reconsideration as a basis for any such collusion and no purpose for such collusion has been alleged. REA submits that such allegations constitute baseless speculation and indicate the weakness of the case of those alleging that the proposed stock issue would give Greyhound control of REA.

In the petition for reconsideration of the Division 3 Order filed by Freight Forwarders Institute, there again appears a rather curious attempt to use an allegation of "control" to re-examine the Standard Express Operations Agreement approved in *Express Contract, 1959* (Docket No. 33140). That allegation, like all others bottomed on the "control" issue, is premature at this time and ought not to be allowed to confuse this Section 20a proceeding.

Several of the intervenors challenge as "conjectural" the statement in the Division 3 Order that "it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant." REA submits that if there is an element of [fol. 374] conjecture in this proceeding, it has been introduced by intervenors' bland assertion—without supporting facts—that 5 Greyhound directors will dominate the 25-man Board of Directors of REA. That argument would be ridiculous if directed against the directors of a corporation whose stock was owned by individuals. The argument becomes incredible when directed against the directors of REA, a corporation whose only stockholders are railroad corporation common carriers, each with a legal staff and board of directors of its own. REA directors are not only elected by such stockholders, they are elected by blocs of such stockholders with common corporate interests.

In the face of such facts, what avails intervenors' citations to "control" cases involving corporations whose stock is widely spread among individuals? Division 3 wisely dismissed such irrelevant arguments in concluding that the question of "control" of REA by Greyhound is premature at this time.

III.

Pursuant to Express Statutory Authority, Division 3 Correctly Issued the Division 3 Order Without Holding a Hearing; Denial of Petitions for a Hearing in this Section 20a Proceeding Has Not Injured Intervenors.

The Division 3 Order, in keeping with the customary procedure followed by the Interstate Commerce Commission [fol. 375] in Section 20a proceedings, was issued by Division 3 on the basis of the record made in this proceeding, but without holding a hearing. The action of Division 3 in denying the petitions for hearing filed by intervenors herein was a proper exercise of administrative discretion, based on express statutory authority, and, because of the continuing jurisdiction of the Commission over the questions raised, has not injured intervenors.

A. Division 3 correctly denied, pursuant to express statutory authority, all petitions for a hearing in this Section 20a proceeding.

There is no basis for challenge to the conduct of Division 3 in denying all requests for hearing in this proceeding. Such denial of hearing, had it been made without express statutory authority, would have been justifiable as a matter of administrative discretion. But such denial of hearing was not based on mere discretion; it was based upon the express statutory authority contained in Section 20a(6) of the Interstate Commerce Act, which provides, in pertinent part, that:

> "The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

Intervenors cannot claim they have not been heard in this proceeding. Although Section 20a of the Interstate Commerce Act permits the Commission to issue orders [fol. 376] thereunder *ex parte*, the Commission in this pro-

petitions for reconsideration as a basis for any such collusion and no purpose for such collusion has been alleged. REA submits that such allegations constitute baseless speculation and indicate the weakness of the case of those alleging that the proposed stock issue would give Greyhound control of REA.

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> "The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

Intervenors cannot claim they have not been heard in this proceeding. Although Section 20a of the Interstate Commerce Act permits the Commission to issue orders [fol. 376] thereunder *ex parte*, the Commission in this pro-

ceeding granted every one of the 12 petitions for intervention filed herein, and each of the intervenors has been permitted to file two (and in some cases, three) petitions with the Commission, all of which have been considered by the Commission. Having obliged the intervenors to this extent, the Commission is not required to go further and schedule a hearing in this proceeding. The intervenors have not put forward in their petitions any evidence for which a hearing should be held; they have merely recited conclusory allegations challenging the legality of the proposed stock issue. The Commission is under no obligation to schedule a hearing just to permit the intervenors again to recite such conclusions.

The point is made in several of the petitions for reconsideration that the Division 3 Order should be based upon evidence. That is a truism, but it does not follow that a hearing must be held in order to obtain such evidence. Division 3 had before it in this proceeding not only the annual and other periodic reports filed with it by REA and other carriers pursuant to law and the Commission's regulations but also the application and supporting documents filed under oath in this proceeding by REA. Such evidence has been held ample support for Section 20a orders in thousands of cases and there is no reason why [fol. 377] this case should be any different. Intervenors have not cited a single Section 20a case which even suggests that a hearing should be held in a case such as the instant one. The administrative process in obtaining Section 20a approval in order to enable an applicant to raise much needed funds by the issuance of its securities has been developed so as not to delay unduly the raising of such funds. There is no basis in the instant proceedings for changing this process—to do otherwise would defeat the purposes of Section 20a.*

* For example, the petition for reconsideration of Trans-Continental Bus System, Inc., *et al.*, states that: "It is imperative that a hearing be held . . . . The evidence of express revenue subject to diversion consists of voluminous and complicated exhibits which

B. The action of Division 3 in denying a hearing in this proceeding has not injured intervenors.

Several of the petitions for reconsideration allege that the denial of a hearing in this proceeding is "capricious" action by Division 3 and a denial of due process to the intervenors. The main thrust of the petitions for reconsideration is that the intervenors should have been given a hearing, not on the propriety of the proposed stock issue under Section 20a, but upon intervenors' allegations of [fol. 378] effect upon competition and control. The flaw in the argument of the intervenors that the denial of a hearing injured them is the continuing jurisdiction of the Commission over effects upon competition and control. The Division 3 Order, it must be stressed, did not approve control of REA by Greyhound under Section 5(2) of the Interstate Commerce Act, thereby immunizing the transaction from the antitrust laws. Quite to the contrary, no finding under Section 5 has been made by Division 3 in this proceeding and it remains open to the intervenors to raise the questions in a proper proceeding.

That the Commission may move at any time against REA and Greyhound for violating Section 5 of the Interstate Commerce Act is made quite clear not only by the express provisions of Section 5 but also Section 13. Section 5 states in part that:

> "(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section."

Section 13(2) of the Interstate Commerce Act provides in part that

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will require extensive oral explanation for a clear understanding." If such hearings, with "voluminous" exhibits and "extensive" testimony, were permitted in Section 20a cases, the purposes of Section 20a would be completely frustrated.

". . . the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this [fol. 379] chapter, or relating to the enforcement of any of the provisions of this chapter."

Similarly, with respect to effect upon competition, Section 11(b) of the Clayton Act provides in part that:

"Whenever the Commission . . . shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

The Commission thus retains full jurisdiction at any time in the future to proceed against REA and Greyhound on the basis of unlawful effect upon competition or unlawful control of REA by Greyhound. That is why Division 3 stated in the Division 3 Order:

"*It further appearing,* That if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition; and it appearing that Greyhound has acknowledged the requirements of section 5 in this regard and has stated that it will file a timely application; and that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly deter-

mined herein, or as creating a presumption as to the action which may be taken on any such application under section 5."

REA submits that the decision of Division 3 to postpone a hearing on control and effect upon competition at this time is a classic example of the proper exercise of discretion by an administrative agency with expertise in its field. [fol. 380] For Division 3 properly held that such questions are premature at this time, while knowing that such questions may always be examined by Division 3 in the light of further events. There are, for example, two such further events which would clarify for Division 3 the questions of control and effect on competition. First, it remains to be seen what will be the extent to which the railroad stockholders of REA exercise their right of first refusal in connection with the tender offer by Greyhound to purchase 1,000,000 shares of REA's common stock from REA stockholders. If the railroad stockholders of REA purchase all shares tendered to Greyhound (as they have said they would) so that Greyhound receives not a single additional share on the tender offer, what is left of the argument of intervenors of "collusion" between such stockholders and Greyhound? If, on the other hand, Greyhound should acquire 1,000,000 additional shares of REA stock, a control situation would clearly be presented by the acquisition of a majority of REA's stock. In that case a control proceeding would obviously be brought and Greyhound has in fact promised the Commission that it would file a timely application under Section 5 in such case.

Secondly, it is premature at this time to speculate as to the lawfulness of economies that *may* be effected as a result of an agreement *that has not as yet even been entered into.* [fol. 381] What form that agreement would take is a matter of conjecture at this time—the Memorandum of Understanding (submitted as Annex G to REA's Return to Information Request dated November 16, 1964) recites that it is merely a recitation of "possible" economies. The form

of such long-term agreement would be affected by the facts disclosed in an examination of possible economies and by the negotiations of the parties. If and when such agreement has been negotiated, the Commission will be in a position to determine whether the consolidation of services and facilities contemplated by such an agreement would produce a deleterious effect upon competition or effective "control" of one party by the other. What possible purpose would be served by holding a hearing at this time when *no one* could possibly testify with any degree of certainty as to what, if any, economies will be carried out?

WHEREFORE, the applicant REA prays that:

(a) all petitions for reconsideration of the Division 3 Order served March 16, 1965, in Finance Dockets Nos. 23324 and 23374 be denied, and

(b) that said Division 3 Order be permitted to become effective as soon as possible.

Dated this 30th day of April 1965.

William J. Taylor, Alan F. Doniger, Joel H. Gross, Henry P. Riordan, Counsel for Applicant Railway Express Agency, Incorporated.

[fol. 382] Certificate of Service (omitted in printing).

[fol. 383]

Service Date:
June 4, 1965

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 28th day of May, A. D. 1965.

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK

Finance Docket No. 23374

SOUTHERN PACIFIC CO.

v.

GREYHOUND CORP. and RAILWAY EXPRESS AGENCY, INC.

CORRECTED ORDER—May 28, 1965

Upon consideration of the record in the above-numbered proceedings, of the petitions in Finance Docket No. 23324, filed by the interveners named in the appendix hereto, and the petition in Finance Docket No. 23374, filed by the intervener-complainant, for reconsideration of the order of Division 3 entered March 15, 1965, the effective date of which was stayed by notice to the parties dated April 16, 1965, to permit consideration of the said petitions for reconsideration, which order denied the interveners' petitions for hearing and other proceedings and dismissed the complaint; and the replies thereto filed by the applicant, Railway Express Agency, Incorporated, and Greyhound Corporation; and

It appearing, That the petitions set forth no material facts of any substance which were not considered by Division 3; that there has been presented no error of fact or

law with respect to the matters complained of by the petitioners; and that no showing has been made warranting reconsideration:

It is ordered, That said petitions be, and they are hereby, denied; and

It is further ordered, That the order of March 15, 1965, shall be effective 20 days from the date this order is served.

By the Commission, Division 3, acting as an Appellate Division.

Bertha F. Armes, Acting Secretary.

(Seal)

[fol. 384]

APPENDIX

Petitions for Reconsideration filed by Interveners as follows:

(a) Railroads of the western district

Southern Pacific Company
The Atchison, Topeka and Santa Fe Railway Company
The Denver and Rio Grande Western Railroad Company
St. Louis Southwestern Railway Company and St. Louis Southwestern Railway Company of Texas

(b) National Trailways Bus System, an association, and several motorbus companies

Transcontinental Bus System, Inc.
American Buslines, Inc.
Arkansas Motor Coaches, Ltd., Inc.
Bayshore Buslines, Inc.
Continental Bus System, Inc.
Continental Crescent Lines, Inc.
Continental Panhandle Lines, Inc.

Continental Southern Lines, Inc.
Continental Tennessee Lines, Inc.
Denver-Colorado Springs-Pueblo Motorway
Denver-Salt Lake-Pacific Stages, Inc.
Continental Pacific Lines, Inc.
Midwest Buslines, Inc.
Smoky Mountain Stages, Inc.
Tennessee Trailways, Inc.
Union Bus Lines, Inc.
Muscatine, Davenport and Clinton Bus Company.

(c) American Trucking Associations, Inc., Regular Common Carrier Conference, and several trucking companies

Denver Chicago Trucking Company, Inc.
Consolidated Freightways Corporation of Delaware and Missouri Consolidated Freightways Corporation
Illinois-California Express, Inc.
Ringsby Truck Lines, Inc.
Watson-Wilson Transportation System, Inc.
Navajo Freight Lines, Inc.
[fol. 385] Pacific Intermountain Express Co.
Transcon Lines, in its own right and as operator of Indianapolis-Kansas City Motor Express Co., and Decatur Seaway Motor Express, Inc.
Western Gillette, Inc.
Interstate Motor Lines, Inc.
T.I.M.E. Freight, Inc.
Consolidated Copperstate Lines.

(d) Freight Forwarders Institute, representing freight forwarders.

[fol. 386] Secretary's Certificate to following transcript (omitted in printing).

[fol. 387]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

[Title omitted]

Finance Docket No. 23374

[Title omitted]

REPLY OF THE GREYHOUND CORPORATION TO PETITIONS FOR RECONSIDERATION—Filed May 5, 1965

[fol. 388] The petitions for reconsideration merely repeat contentions previously made by petitioners and considered by Division 3 in its order of March 15, 1965. There is nothing new. There is certainly nothing which would warrant a modification of the Division's order.

The petitioners advance varying versions as to why there should be a reconsideration, but each of the petitioners ends up at the same place—with a contention that Greyhound through a 20% stock interest would control REA. The evidence produced by REA shows conclusively [fol. 389] that this could not occur. Evidently this evidence has persuaded the Department of Justice since it has in effect accepted the Division's order by failing to petition for reconsideration.

In the expectation that applicant REA will answer the petitions fully, we shall simply present a concise statement of Greyhound's position on the principal points raised again by petitioners.

1. The Impossibility of Control by Greyhound with Only a 20% Stock Interest

As we have said, each and every petitioner bases its case for reconsideration on the proposition that Greyhound could control REA with only a 20% stock interest.

[File endorsement omitted]

Greyhound, of course, feels that control of REA by Greyhound would be beneficial to REA and Greyhound and particularly to the shipping public, and Greyhound, therefore, attempted to acquire control through negotiations with the railroad stockholders of REA for at least a 51% stock interest, but it was unsuccessful. Then Greyhound sought an equal stock interest with the railroads, but again without success. Finally, Greyhound agreed to what the railroads offered—a 20% stock interest.

In view of the history of the negotiations, it is obvious that the railroads did not intend to turn control of REA [fol. 390] over to Greyhound through the 20% stock interest. Certainly Greyhound is convinced that with only a 20% stock interest, with only five out of twenty-five directors, and with the railroads making common cause by groups as they did in the negotiations with Greyhound, Greyhound would not be in a position to control REA. This is so clear to Greyhound that under these circumstances it would not desire to be authorized by the Commission to control REA. It would not want the ostensible responsibility of control when it would not be in a position to exercise actual control.

2. The Impossibility of Joint Control by Greyhound and Certain Rail Carriers

Evidently recognizing the implausible character of their contention that Greyhound with only a 20% stock interest could control REA, certain of the petitioners advance a fanciful contention that Greyhound would have its way through the cooperation of certain "friendly" railroads. This, of course, does not include the self-styled friendly Southern Pacific, which is Greyhound's largest stockholder (nonvoting). The position of that carrier in this proceeding would indicate that affiliation has no bearing on the issue of REA control. But nonetheless Transcontinental Bus System, Inc., and the other bus company intervenors contend that *former affiliations* are significant. They say [fol. 391] that

> "Division 3 apparently has not considered some of the former affiliations of Greyhound." (Petition, p. 5)

and then go on to point out that at one time the New York Central, the Pennsylvania, and the Great Northern Railroads owned stock in some of the constituent companies of Greyhound. From this it is reasoned that these railroads would now cooperate with Greyhound to permit it to control REA.

It is, of course, ridiculous on its face to contend that these railroads "for old times' sake" would be willing to turn over control of REA to Greyhound, but it is all the more ridiculous when one considers that these same railroads would not go along with Greyhound's proposals to acquire, first, a majority stock interest, and, later, an equal stock interest with the railroads.

The bus petitioners go on to say that

> "It is apparent that the railroads of the eastern and southern districts, along with Greyhound, could place the control of REA in the hands of Greyhound." (Petition, p. 5)

They are joined in this contention by the American Trucking Association, et al., who state that

> ". . . since over 80 percent of the railroad stockholders voted to accept Greyhound's offer to buy control of Railway Express, it is reasonable to expect that a majority of such stockholders would support Greyhound's managerial aims, and that they would vote [fol. 392] in support of its policies. Thus even though Greyhound would be a minority stockholder, it is possible for it to control Railway Express by virtue of the acquiescence of sympathetic railroad owners of a substantial amount of Railway Express stock." (Petition, p. 8)

As we have already indicated, we have not yet found any of the railroad shareholders to be sympathetic to Greyhound's control of REA. Contrary to what the trucking petitioners state, over 80% of the railroad stockholders did not vote to accept Greyhound's offer to buy control of REA. They rejected that offer and they rejected the later offer of Greyhound to buy an equal 50% interest with the rail carriers. The rail carriers offered Greyhound a 20% interest and this is what Greyhound accepted. It is plain from the record in this case that there is no possibility of control of REA by Greyhound with the friendly cooperation of the rail carriers. This is the type of strained argument which the petitioners have had to rely upon in their attempt to convert a Section 20a securities case into a Section 5 control case. We trust that the Commission will not be misled.

3. The Subsequent Offer of Greyhound to Acquire an Additional One Million Shares of REA Stock

Certain of the petitioners purport to find some significance in the obligation of Greyhound subsequently to [fol. 393] offer to purchase an additional one million shares of REA stock. In due course, Greyhound does intend to make the offer for the one million shares as it is obligated to do under the agreement with REA. But what the petitioners completely ignore is that these shares are all subject to a right of first refusal in the present railroad shareholders and that it is quite certain that any shares which may be tendered to Greyhound will be acquired by existing railroad shareholders under this right. Greyhound has been told repeatedly by representatives of the Southern Pacific Company and others that it will not acquire a single share of REA stock pursuant to this offer. The Commission will note that neither the Southern Pacific Company nor any of the other railroad petitioners takes issue with this. They know (and they should in candor have informed the Commission) that it is their

plan to acquire any shares tendered to Greyhound pursuant to its offer.

In any event, this is now immaterial because if additional shares are made available to Greyhound in such amount as to raise the possibility of control, an appropriate application will be filed with the Commission. Greyhound's acceptance of the REA offer was "subject to all necessary authorizations from the Interstate Commerce [fol. 394] Commission", and it is Greyhound's intention to see that such authorizations are obtained. The Division properly recognized that it would be premature to deal with this matter at the present time, and the Division adequately protected the Commission's jurisdiction as well as the rights, if any, of the petitioners by providing in the order

> "*It further appearing,* That if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition; and it appearing that Greyhound has acknowledged the requirements of section 5 in this regard and has stated that it will file a timely application; and *that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5;*" (Emphasis supplied.)

4. The Possibility of Coordination or Consolidation of Facilities or Services of REA and Greyhound

Some of the petitioners attempt to make much of the possible coordination or consolidation of facilities or services of REA and Greyhound. The petitioners have demonstrated considerable versatility in advancing all sorts of

situations, all fictitious and all wholly within the realm of speculation. The fact is, as the record shows, that no coordination or consolidation plan now exists. If in the future REA and Greyhound should develop any such plan which [fol. 395] would require authorization of this Commission under Section 5 or any other section of the Act, an appropriate application will be filed with the Commission. What Greyhound and REA may do in the future in the way of coordination or consolidation is now unknown even to them and could not possibly form the basis for any sort of an order under Section 5 of the Act.

5. The Lack of Necessity for a Hearing

Petitioners know that they are not entitled to a hearing as a matter of right, and they also know that it would be somewhat unusual for the Commission to hold a hearing on a security issue application under Sections 20a and 214 of the Act. Petitioners have, therefore, attempted to turn this proceeding into a Section 5 case and without any real basis for doing so.

The position of the petitioners amounts to this—since they have raised the issue of control in the Section 20a proceeding, the Commission *must* institute an investigation under Section 5, the Commission *must* hold a hearing, *and the Commission cannot even comment upon the facts which which indicate that no such investigation and hearing would be proper*. Certain of the petitioners even take the Commission to task for commenting on the facts of record which [fol. 396] demonstrate that an investigation of control under Section 5 of the Act would not be appropriate. (Petition of Freight Forwarders Institute, pp. 4-7; Petition for Reconsideration on Behalf of The Atchison, Topeka and Santa Fe Railway Company, p. 7; Petition for Reconsideration of Intervener and Complainant Southern Pacific Company, p. 5.) This is an extreme position and one which the Commission could not possibly accept. Simply because some of the parties make unfounded allegations of control and support this with farfetched arguments such as those

of the bus carriers and trucking carriers hereinbefore mentioned, the Commission does not have to close its eyes to the fact that this is simply a security issue case and does not involve any possibility of control at this time.

Greyhound has never objected to the Commission making such investigation as it might deem necessary in this proceeding. REA filed a detailed application and at the request of the Commission supplied a considerable volume of supplementary factual material. The Commission had before it all of the essential facts when it made its order of March 15, 1965. Any further investigation would simply waste the time of the Commission and the parties and could lead to no other conclusion than that set forth in the order [fol. 397] of Division 3.

The petitions for reconsideration should forthwith be denied.

Respectfully submitted,

Robert J. Bernard, Gerald H. Trautman, Attorneys for The Greyhound Corporation.

[fol. 398] Certificate of Service (omitted in printing).

[fol. 399]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. FD-23324

[Title omitted]

PETITION SEEKING A FINDING THAT THE PROCEEDING INVOLVES AN ISSUE OF GENERAL TRANSPORTATION IMPORTANCE—Filed June 7, 1965

Now comes Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Bayshore Buslines, Inc., Continental Bus System, Inc., Con-

tinental Crescent Lines, Inc., Continental Panhandle Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Inc., Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Buslines, Inc., and Muscatine, Davenport and Clinton Bus Company, Petitioners herein, requesting the Commission to find that the instant proceeding is one involving an issue of general transportation importance, and in support thereof would show the Commission as follows:

I.

Docket No. FD-23324 is the application of R.E.A. for authority, under Sections 20a and 214 of the Act, to issue 500,000 shares of its authorized but unissued shares of common stock to the Greyhound Corporation (Greyhound) for a total price of Ten Million Dollars ($10,000,000).

Petitioners, in opposition to said application, timely filed petitions seeking (1) leave to intervene, (2) an Order requiring R.E.A. and Greyhound to file an application under Section 5 of the Act, (3) consolidation of the securities [fol. 400] and Section 5 application for hearing on a common record, and (4) oral hearings in said proceedings. The Commission, by Order served December 8, 1964, permitted Petitioners to intervene in the instant proceeding.

By Order served March 16, 1965, Division Three denied the numerous petitions for hearing and other proceedings, and authorized the proposed stock issuance. Petitioners timely filed their Petition for Reconsideration of the Order of Division Three, and, by Order served May 28, 1965, Division Three denied all Petitions for Reconsideration.

II.

The application states that the proposed transaction will provide a working basis for R.E.A. and Greyhound entering into an agreement with respect to the consolidation of

certain operating functions and facilities. This means a consolidation of the operating functions and facilities of the largest motorbus company in the world, and the largest express company in the world. The proposed consolidation presents issues and questions never before considered by this Commission. The consolidation of a bus company and express company has never been attempted under the Act, and whether the issuance of stock by R.E.A. to Greyhound is in the public interest and consistent with the proper performance by R.E.A. of service to the public is a matter that cannot properly be determined by the self-serving declarations of R.E.A. and Greyhound. Since the Commission has steadfastly refused to order a hearing in this matter to produce facts upon which findings can be properly made, the findings in these proceedings are based solely upon those self-serving declarations.

Petitioners submit that the issuance of stock by R.E.A. to Greyhound is not in the public interest and is neither necessary nor appropriate for, or consistent with, the proper performance by R.E.A. of service to the public as an express company or common carrier. As stated by the Commission in *Railway Express Agency, Inc.,—Extension* [fol. 401] *—Nashua, N.H.*, 91 M.C.C. 311, the Commission must, in accomplishing the purposes forming the National Transportation Policy, provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, *and recognize and preserve the inherent advantages of the several modes of transportation.* The proposed consolidation of R.E.A. and Greyhound operations and facilities, if allowed, would destroy the customary distinction between and inherent advantages of the several modes of transportation.

Many of Petitioners' passenger operations are dependent upon express revenue in order to maintain continuous and adequate service to the public. The combined efforts of R.E.A. and Greyhound will place Petitioners in the position of being unable to compete with them for express revenue and would only result in a restraint of

competition, which result is clearly incompatible with the public interest.

Wherefore, Petitioners pray that the Commission find that the proceeding is one involving an issue of general transportation importance.

Respectfully submitted,

Transcontinental Bus System, Inc., et al., Warren A. Goff, D. Paul Stafford, 315 Continental Avenue, Dallas, Texas 75207, Attorneys for Petitioners.

Certificate of Service (omitted in printing).

[fol. 402]

Service Date
June 17, 1965

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK

Finance Docket No. 23374

SOUTHERN PACIFIC CO.

v.

GREYHOUND CORP. and RAILWAY EXPRESS AGENCY, INC.

In the Matter of Postponement of Effective Date of Order

Present: Charles A. Webb, Chairman, to whom the above-entitled matter has been assigned for action thereon.

ORDER—June 16, 1965

It appearing, That the order of the Commission, Division 3, dated March 15, 1965, as modified by the corrected order

of the Commission, Division 3, Acting as an Appellate Division, dated May 28, 1965, in the above-entitled proceedings, will become effective 20 days from the date of service on June 4, 1965, of the corrected order of May 28, 1965; and

It further appearing, That on June 16, 1965, a court action was filed in the United States District Court for the District of Colorado entitled *The Denver and Rio Grande Western Railroad Company, et al.* v. *United States and Interstate Commerce Commission,* seeking to have the court annul and set aside the orders referred to above, and requesting that the court enter a temporary restraining order pending final disposition of said action; and good cause appearing therefor:

It is ordered, That the effective date of the order entered by the Commission, Division 3, on March 15, 1965, as amended by the corrected order entered by the Commission, Division 3, Acting as an Appellate Division, on May 28, 1965, be, and it is hereby, postponed until further order of the Commission.

Dated at Washington, D. C., this 16th day of June, A.D. 1965.

By the Commission, Chairman Webb.

Bertha F. Armes, Acting Secretary.

(Seal)

[fol. 403]

Service Date:
August 13, 1965

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of August, A. D. 1965.

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK

ORDER—August 11, 1965

Upon consideration of the record in the above-entitled proceeding, including: (a) the order of March 15, 1965, by Division 3, granting the application as made; (b) petitions filed by interveners for reconsideration of the said order; (c) replies thereto by applicant and Greyhound Corporation; (d) the order of May 28, 1965, by Division 3, acting as an Appellate Division, denying the said petitions; and (e) the petition dated June 4, 1965, by Transcontinental Bus System, Inc., et al., interveners, seeking a finding that the proceeding involves an issue of general transportation importance; and

It appearing, That on June 16, 1965, a court action was filed in the United States District Court for the District of Colorado entitled *The Denver and Rio Grande Western Railroad Company, et al.* v. *United States and Interstate Commerce Commission,* seeking to have the court annul and set aside the orders referred to above:

It is ordered, That the proceeding be, and it is hereby, recalled from Division 3.

It is further ordered, That the order of Appellate Division 3, dated May 28, 1965, be, and it is hereby, vacated and

set aside, and that the proceeding be, and it is hereby, reopened for reconsideration on the present record.

It is further ordered, Upon reconsideration, that the action taken by Division 3 in its order dated March 15, 1965, be, and it is hereby, affirmed.

It is further ordered, That the petition requesting a finding that an issue of general transportation importance is involved be, and it is hereby, dismissed as moot; and

It is further ordered, That the order of March 15, 1965, as affirmed hereby, shall be effective thirty days from the date of service of this order.

By the Commission.

H. Neil Garson, Secretary.

(Seal)

[fol. 404]

Service Date
August 13, 1965

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of August, A. D. 1965.

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK

Finance Docket No. 23374

SOUTHERN PACIFIC CO.

v.

GREYHOUND CORP. and RAILWAY EXPRESS AGENCY, INC.

CORRECTED ORDER—August 11, 1965

Upon consideration of the record in the above-entitled proceedings, including (a) the order of March 15, 1965, by

Division 3, granting the application as made; (b) petitions filed by interveners for reconsideration of the said order; (c) replies thereto by applicant and Greyhound Corporation; (d) the order of May 28, 1965, by Division 3, acting as an Appellate Division, denying the said petitions; and (e) the petition dated June 4, 1965, by Transcontinental Bus System, Inc., et al., interveners, seeking a finding that the proceeding involves an issue of general transportation importance; and

It appearing, That on June 16, 1965, a court action was filed in the United States District Court for the District of Colorado entitled *The Denver and Rio Grande Western Railroad Company, et al.* v. *United States and Interstate Commerce Commission,* seeking to have the court annul and set aside the orders referred to above:

It is ordered, That the proceedings be, and they are hereby, recalled from Division 3.

It is further ordered, That the order of Appellate Division 3, dated May 28, 1965, be, and it is hereby, vacated and set aside, and that the proceedings be, and they are hereby, reopened for reconsideration on the present record.

It is further ordered, Upon reconsideration, that the action taken by Division 3 in its order dated March 15, 1965, be, and it is hereby, affirmed.

It is further ordered, That the petition requesting a finding that an issue of general transportation importance is involved be, and it is hereby, dismissed as moot; and

It is further ordered, That the order of March 15, 1965, as affirmed hereby, shall be effective thirty days from the date of service of this order.

H. Neil Garson, Secretary.

(Seal)

[fol. 405]

Service Date
August 18, 1965

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK

Finance Docket No. 23374

SOUTHERN PACIFIC CO.

v.

GREYHOUND CORP. and RAILWAY EXPRESS AGENCY, INC.

In the Matter of Postponement of Effective Date of Order

Present: Charles A. Webb, Chairman, to whom the above-entitled matter has been assigned for action thereon.

ORDER—August 17, 1965

It appearing, That the order of the Commission, Division 3, dated March 15, 1965, as modified by the corrected order of the Commission, dated August 11, 1965, in the above-entitled proceedings, will become effective 30 days from August 13, 1965, the date of service of the corrected order of August 11, 1965; and

It further appearing, That a court action has been filed in the United States District Court for the District of Colorado entitled *The Denver and Rio Grande Western Railroad Company, et al.* v. *United States and Interstate Commerce Commission,* seeking to have the court annul and set aside the order of the Commission, Division 3, dated March 15, 1965, as modified, and requesting that the court

enter a temporary restraining order pending final disposition of said action; and good cause appearing therefor:

It is ordered, That the effective date of the order entered by the Commission, Division 3, on March 15, 1965, as modified by the corrected order entered by the Commission on August 11, 1965, be, and it is hereby, postponed until further order of the Commission.

Dated at Washington, D. C., this 17th day of August, A.D. 1965.

By the Commission, Chairman Webb.

H. Neil Garson, Secretary.

(Seal)

[fol. 406] CERTIFICATE OF CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 407]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

Three-Judge Case

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS; SOUTHERN PACIFIC COMPANY; Plaintiffs,

against

UNITED STATES OF AMERICA; and INTERSTATE COMMERCE COMMISSION; Defendants.

COMPLAINT—Filed June 16, 1965

[fol. 408] To the Honorable Judges for the District Court of the United States for the District of Colorado:

Come Now the plaintiffs above named, by their attorneys, and for their action against defendants respectfully allege and show:

1.

This is a proceeding to enjoin, set aside, annul, and suspend, Orders entered on March 15, 1965, and May 28, 1965, by the Interstate Commerce Commission (hereinafter referred to as the "Commission") in administrative proceedings identified as Finance Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* and Finance Docket

[File endorsement omitted]

2.

Plaintiffs are corporations, as described in Exhibit A hereto attached and made a part hereof, and are common carriers of freight by railroad and are subject to the Interstate Commerce Act (49 U.S.C., § 1, et seq.), in respect of their interstate operations. Plaintiffs are common stockholders of Railway Express Agency, Incorporated (hereinafter referred to as "REA"), a common carrier by express on railroads and a common carrier by motor vehicle, engaged in the transportation of property between points in all states of the United States and, as such, REA is also subject to the provisions of the Interstate Commerce Act. REA is authorized to issue 2,576,000 shares of common stock, of which 1,999,188 shares have been duly issued and are outstanding. Plaintiffs are owners of shares of common stock of REA as follows:

[fol. 409] The Denver and Rio Grande Western Railroad Company ..... 12,456 Shares

The Atchison, Topeka and Santa Fe Railway Company ..... 95,496 Shares

St. Louis Southwestern Railway Company ..... 4,152 Shares

St. Louis Southwestern Railway Company of Texas ..... 4,152 Shares

Southern Pacific Company ..... 95,496 Shares

3.

The United States of America is made defendant in this proceeding pursuant to Title 28, United States Code, Section 2322. Defendant Interstate Commerce Commission is an agency of the United States, created pursuant to the Interstate Commerce Act (49 U.S.C. § 1, et seq.).

4.

This is a civil action, and jurisdiction of this Court is invoked under Sections 1336, 2284, and 2321 through 2325, inclusive, of Title 28, United States Code.

5.

Venue lies in this judicial district under Section 1398 of Title 28, United States Code, because the principal office of The Denver and Rio Grande Western Railroad Company is in this district.

6.

This controversy arises out of two proceedings before the Commission. The first proceeding, in Finance Docket No. 23324, was instituted by application filed on or about October 7, 1964, by REA under Sections 20a and 214 of the Interstate Commerce Act, for authority to issue 500,000 shares, constituting about twenty per cent, of REA's [fol. 410] authorized common stock to The Greyhound Corporation (hereinafter referred to as "Greyhound") at the price of $20 per share, upon the following terms and conditions:

(a) The REA By-Laws will be amended so that The Greyhound Corporation shall be permitted to name 20% of the REA Board of Directors.

(b) The REA Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,637,054 of outstanding 5% notes, issued originally to REA's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.

(c) The REA Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies,

improve service and increase public receptivity and patronage.

(d) The REA Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some REA stock to airlines and/or the general public if and when conditions appear favorable to the best interests of REA as a company.

(e) The Greyhound Corporation shall offer to purchase up to 1,000,000 shares of the common stock of REA from present shareholders at a price of $20 per share cash. Such offer to purchase will remain open and in full force and effect for a period of sixty days following the closing date of the transaction involving the 500,000 authorized unissued shares of REA.

(f) The offer of REA shall expire at 12:00 Noon on December 31, 1964.

(g) The offer of REA may be accepted immediately, subject to all necesary authorizations from the Interstate Commerce Commission and to approval by the shareholders of this corporation of (i) the issuance to The Greyhound Corporation pursuant to said offer of 500,000 shares of authorized but unissued common stock of this corporation and (ii) the amendments to the By-Laws of this corporation required by subparagraph (a) of said offer.

The second proceeding, in Finance Docket No. 23374, was instituted by complaint filed on or about October 30, 1964, by Southern Pacific Company, naming Greyhound and REA as defendants. The complaint sought to have the proposed transaction for sale by REA of 500,000 shares of its common stock declared unlawful under Section 5(4) of the Interstate Commerce Act, unless an application were [fol. 411] presented to and authority secured from the Commission under Section 5(2)(b) of the Act. The com-

plaint alleged that no such application had been filed, and that the transaction was unlawful, and asked the Commission, under Section 5(7) of the Act, to direct the defendants to cease and desist from consummating the proposed transaction.

7.

Accompanying this complaint is a copy of the material records in the said proceedings before the Commission, duly certified to by the Secretary of the Commission, according to law [Title 49, U.S.C., § 16(13)], which record are made a part of this complaint by reference, and are hereinafter referred to collectively as the "record" and respectively by the names of the documents comprising such record. All of the certified copies of such records in Interstate Commerce Commission Finance Dockets Nos. 23324 and 23374 are tendered as prima facie evidence of what they purport to be for the purpose of this judicial proceeding.

8.

Greyhound is a corporation having its principal place of business at Chicago, Illinois, and is a common carrier by express and motor vehicle, or controls common carriers by express or motor vehicle, and is engaged in the transportation of property and passengers between points in all states of the United States except Alaska and Hawaii and, as such, Greyhound is subject to the provisions of the Interstate Commerce Act.

9.

REA and Greyhound are competitors for the transportation of property between points in all states of the United States except Alaska and Hawaii.

[fol. 412] 10.

In the proceeding in Finance Docket No. 23324, petitions for leave to intervene and protests in opposition requesting

a formal hearing were filed by The Denver and Rio Grande Western Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, and Southern Pacific Company, Freight Forwarders Institute, representing freight forwarders, American Trucking Associations, Inc., Regular Common Carrier Conference, and eleven trucking companies, National Trailways Bus System, an association, and seventeen motor bus companies. The only party petitioning for leave to intervene in support of the application was Greyhound. The United States Department of Justice filed a petition for leave to intervene, requesting oral hearings, a prehearing conference, and consolidation with a proceeding to determine the lawfulness of the proposed transaction under Section 7 of the Clayton Act. National Trailways Bus System and several motor bus companies, in their petitions requested an order requiring Greyhound to file an application under Section 5 of the Interstate Commerce Act, and requesting consolidation and hearing of such application on a common record with the application for authority to issue said stock. Finance Board No. 2 of the Commission certified the application to Division 3 for determination.

11.

In the proceeding in Finance Docket No. 23374, answers and motions to dismiss the complaint were filed by REA and Greyhound, and reply to the motion to dismiss was filed by Southern Pacific Company.

[fol. 413] 12.

The Commission held no hearings whatever in either proceeding, and by Order entered March 15, 1965, by Division 3, in both of said cases, denied the petitions of interveners for a hearing, dismissed the complaint in Finance

Docket No. 23374, and authorized REA to issue 500,000 shares of its common stock in accordance with the application in Finance Docket No. 23324.

13.

Petition was filed on April 1, 1965, by American Trucking Associations, Inc., and Regular Common Carrier Conference, and on or about April 8, 1965, by Freight Forwarders Institute, to stay the effective date of Division 3's Order pending consideration of petitions for reconsideration. Within the time permitted by law, petitions for reconsideration of the Order of March 15, 1965, were filed by The Denver and Rio Grande Western Railroad Company, Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company, St. Louis Southwestern Railway Company, and St. Louis Southwestern Railway Company of Texas, Freight Forwarders Institute, American Trucking Associations, Inc., and Transcontinental Bus System, Inc., et al. On April 16, 1965, the Commission issued a notice stating that the Commission's Order of March 15, 1965, was stayed pending disposition of the matter. Finally, by Order entered May 28, 1965, the Commission, by Division 3 acting as an appellate division, denied the petitions for reconsideration of said Order of March 15, 1965, providing that it should become effective twenty days from May 28, 1965. Subsequently, a Corrected Order, entered May 28, 1965, was issued, directing that the Order of March 15, 1965, become effective twenty days from June 4, 1965.

[fol. 414]

14.

The Commission's Order of March 15, 1965, will become effective on June 24, 1965, unless restrained by Order of this Court, or unless that date is extended by Order of the Commission.

15.

Plaintiffs have exhausted their administrative remedies, and this action is brought to obtain judicial review of, and judicial relief from, the Commission's Orders of March 15, 1965, and May 28, 1965, as corrected.

16.

The Commission, in making and issuing said Orders of March 15, 1965, and May 28, 1965, exceeded its power and authority delegated to it by the Interstate Commerce Act, and erred as a matter of law, and acted unlawfully, arbitrarily, capriciously, and in abuse of its discretion in the following particulars, among others:

(a) In that the Commission failed and refused, despite its duty under Section 12(1) of the Interstate Commerce Act, 49 U.S.C., § 12(1), to execute and enforce all the provisions of Part I of the Interstate Commerce Act, to exercise its jurisdiction under Section 5(7), invoked by complaint in Finance Docket No. 23374, to investigate and determine, after notice and hearing, whether the transaction set forth in paragraph 6 hereof would result in unlawful control of REA by Greyhound in violation of Section 5(4) of that Act.

(b) In that the Commission failed and refused, in violation of due process of law, and despite its duty under Sections 20a(2) and 214 of the Interstate Com- [fol. 415] merce Act, 49 U.S.C., §§ 20a(2) and 314, to investigate the purposes and uses of the proposed issue and the proceeds thereof, to conduct hearings as requested by plaintiffs and other parties in Finance Docket No. 23324 desiring to present evidence in opposition to the application therein, in order to determine whether the transaction set forth in paragraph 6 hereof was in violation of Section 5(4) of the Interstate Commerce Act.

(c) In that the Commission's findings set forth in its Order of March 15, 1965, in support of its approval of the application of REA in Finance Docket No. 23324 and of its dismissal of the complaint in Finance Docket No. 23374 are deficient in that they were made upon mere allegations in the pleadings without the benefit of hearings, and without the benefit of evidence in opposition, and consequently were not supported by substantial evidence on the record considered as a whole, and the basis for such findings failed to satisfy the requirements of Sections 20a and 214 of the Interstate Commerce Act, 49 U.S.C., §§ 20a and 314.

Such findings fail to satisfy the statutory requirements of Section 20a(2) for the reason that a transaction violating Section 5(4) of the Act, as alleged by opposing parties, could not be deemed compatible with the public interest or appropriate for or consistent with the proper performance by a carrier of service to the public.

17.

If the Orders of March 15, 1965, and May 28, 1965, are enforced, said Orders will cause plaintiffs to suffer immediate and irreparable damage, in that:

[fol. 416] (a) Once the transaction is approved and consummated, it would be extremely difficult, if not impossible, to secure the divestment of control by Greyhound and to restore the status quo at a later date and, in any event, plaintiffs would be compelled to incur substantial expense in lengthy and complicated legal proceedings to that end.

(b) On and after the effective date of such Orders, i.e., June 24, 1965, REA and Greyhound would be in a position to complete the proposed transaction set forth in paragraph 6 hereof, consummate the sale of its stock to Greyhound, and be immediately represented on the REA Board of Directors by five directors, giv-

ing Greyhound, to its competitive advantage and the detriment of REA, and thus of plaintiffs as stockholders of REA, the opportunity of acquiring confidential information as to the traffic, finances, and operations of REA.

(c) Plaintiffs would be without any adequate remedy at law to prevent the consummation of what they believe to be an illegal transaction detrimental to the interests of REA and, consequently, injurious to plaintiffs' interests as stockholders of REA, in that plaintiffs would have no one to look to for legal compensation for such injury.

18.

No injury will be sustained by defendants or by the public through the issuance of a temporary restraining order or an interlocutory injunction pending final disposition of this proceeding.

Wherefore, plaintiffs pray:

1. That the Court issue a temporary restraining order [fol. 417] pursuant to Sections 2284(3) and 2324 of Title 28, United States Code, restraining the operation, enforcement or execution of the Orders of the Commission dated March 15, 1965, and May 28, 1965.

2. That process may issue against defendants, the United States of America and the Interstate Commerce Commission.

3. That a Court constituted as required by Title 28 of the United States Code, Sections 2284 and 2321-2325, consisting of three judges, be convened.

4. That upon the expiration of such temporary restraining order the Court grant an interlocutory injunction enjoining the Commission from making its Orders effective pending the final hearing and determination of this action.

5. That the Court permanently set aside, annul and suspend the Commission's Orders and grant a permanent injunction against their operation, enforcement and execution.

6. That plaintiffs recover their proper costs.

7. That plaintiffs have such other and further relief as may be appropriate.

Lee, Bryans, Kelly & Stansfield, Robert S. Gast, Jr., 550 Fifteenth Street, Denver, Colorado 80202; T. A. White, 1531 Stout Street, Denver, Colorado 80217; Richard K. Knowlton, 80 East Jackson Boulevard, Chicago, Illinois 60604; Harry B. La Tourette, C. W. Fiddes, 1517 West Front Street, Tyler, Texas 75702; Jeremiah C. Waterman, 205 Transportation Building, Washington, D. C. 20006, by Robert S. Gast, Jr., Attorneys for Plaintiffs.

[fol. 418] *Duly sworn to by Charles W. Burkett, jurat omitted in printing.*

[fol. 419]

EXHIBIT A TO COMPLAINT

Plaintiff The Denver and Rio Grande Western Railroad Company is a corporation organized under the laws of the State of Delaware, having its principal office at Denver, Colorado, and operating lines of railroad in three states.

Plaintiff The Atchison, Topeka and Santa Fe Railway Company is a corporation organized under the laws of the State of Kansas, having its principal office at Topeka, Kansas, and operating lines of railroad in twelve states, including Colorado.

Plaintiff St. Louis Southwestern Railway Company is a corporation organized under the laws of the State of Mis-

souri, having its principal office at Tyler, Texas, and operating lines of railroad in six states.

Plaintiff St. Louis Southwestern Railway Company of Texas is a corporation organized under the laws of the State of Texas, having its principal office at Tyler, Texas, and owning lines of railroad in Texas which are operated by St. Louis Southwestern Railway Company, as lessee.

Plaintiff Southern Pacific Company is a Corporation organized under the laws of the State of Delaware, having its principal office at San Francisco, California, and operating lines of railroad in eight states.

[fol. 420]

AFFIDAVIT OF ROBERT J. MCLEAN—Filed June 16, 1965

State of California,
City and County of San Francisco, ss.:

ROBERT J. MCLEAN, being duly sworn, deposes and says:

My name is Robert J. McLean, I am Assistant Vice President and Assistant Treasurer of Southern Pacific Company, with offices at 65 Market Street, San Franciso, California. I have held my present position since January 1, 1962. Prior thereto, and for the period 1948 to 1962, I was also employed by Southern Pacific Company in its Law Department in various positions, as Attorney, Assistant General Attorney, and General Attorney.

This affidavit is submitted in behalf of the plaintiffs. The plaintiffs are all owners of stock of the Railway Express Agency, Incorporated (hereinafter called REA). The total outstanding stock of REA consists of 1,999,188 shares of common stock, of which plaintiffs own 211,752 shares, or 10.59 per cent. The common stock of REA owned by plaintiffs consists of the following:

The Atchison, Topeka and Santa Fe Railway Company	95,496 shares

[File endorsement omitted]

The Denver and Rio Grande Western Railroad Company	12,456 shares
St. Louis Southwestern Railway Company	4,152 shares
St. Louis Southwestern Railway Company of Texas	4,152 shares
Southern Pacific Company	95,496 shares

The purpose of my affidavit is to establish the irreparable and serious damage REA and plaintiffs as stockholders of REA would suffer if the transaction set forth in paragraph 6 of the complaint herein is permitted to go into effect. REA and The Greyhound Corporation (hereinafter called [fol. 421] Greyhound) are in competition for the transportation of freight between points in the United States. Under this proposed transaction, REA would issue common stock amounting to 20 per cent of its authorized shares to Greyhound, and Greyhound would be authorized to nominate five of the twenty-five directors on the REA Board. In addition, one of the terms of the transaction requires the REA Board to adopt a resolution, "declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage". The conditions of the proposed transaction thus indicate a definite plan or design to effect a consolidation of REA and Greyhound operations and facilities. The stock ownership of REA is presently held by plaintiffs and other railroads over whose lines it operates an express service for the transportation of property, particularly smaller packages. Greyhound is likewise engaged in the transportation of smaller packages on its motor buses.

The acquisition by Greyhound of an interest in REA, giving Greyhound control or the power to control REA

which may well be exercised in collaboration with other REA stockholders, would have a most disastrous impact on the nationwide express business conducted by REA. Such business is directly competitive with Greyhound small package transportation service and Greyhound would be in a position to use such control to effect broad changes in the operation of the express business with resulting diversion of traffic to the advantage of Greyhound and the detriment of REA and some or all of its railroad stockholders.

The effective date of the Commission's order which is [fol. 422] sought to be enjoined is June 24, 1965, and on that date, unless a restraining order is granted, Greyhound will be in a position to consummate the proposed transaction by acquiring a 20 per cent stock interest and nominating five members of the twenty-five-member Board of Directors of REA. Once the transaction becomes a *fait accompli* it would be next to impossible to effect a divestiture of the control without great expense and lengthy legal proceedings, to the irreparable damage of REA and, consequently, its stockholders.

A further source of irreparable injury, in the event the proposed transaction is not restrained, would lie in the ability of Greyhound with five directors on the Board of REA to obtain confidential information and data as to the operation, finances, and traffic of REA. Such information and data could be readily used by Greyhound to its competitive advantage in effecting diversion of traffic from REA, also to the irreparable damage to REA and its stockholders.

Robert J. McLean

Subscribed and sworn to before me this 11th day of June, 1965.

H. G. Bunn, Jr., Notary Public, in and for the City and County of San Francisco, State of California.

My commission expires June 25, 1967.

[fol. 423]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

COMPLAINT OF INTERVENING PLAINTIFFS TO SET ASIDE AND ANNUL ORDERS OF THE INTERSTATE COMMERCE COMMISSION—Filed July 21, 1965

Come now American Trucking Associations, Inc., and Regular Common Carrier Conference, intervening plaintiffs, and for their cause of action state:

Jurisdiction

1. This is an action to suspend, enjoin, annul, and set aside two orders of the defendant Interstate Commerce Commission, and arises under the provisions of Sections 17 and 205(g) and (h) of the Interstate Commerce Act, 49 U.S.C. §§ 17, 305(g) and (h), Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, and Sections 1336, 1398, 2284, and 2321 through 2325 of the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284, and 2321 through 2325. The United States of America is named as a defendant pursuant to Section 2322 of the Judicial Code, 28 U.S.C. § 2322.

Plaintiffs

2. The American Trucking Associations, Inc., is the national organization of the trucking industry, representing all types of motor carriers of property, on whose behalf it customarily appears in proceedings before the Interstate Commerce Commission and the courts. It is duly organized and existing as a non-profit corporation under the

[File endorsement omitted]

laws of the District of Columbia, and maintains offices at 1616 P Street, N. W., Washington, D. C. 20036.

3. The Regular Common Carrier Conference, an affiliate of the American Trucking Associations, Inc., is a nonprofit corporation organized under the laws of the District of Columbia, and maintains its office at 1616 P Street, [fol. 424] N. W., Washington, D. C. 20036. Its membership is comprised of approximately 1600 common carriers by motor vehicle performing transportation in interstate and foreign commerce over regular routes and under regulation by the Interstate Commerce Commission.

Statement

4. By application filed October 7, 1964, Docket No. 23324, Railway Express Agency, Incorporated (Railway Express), seeks authority under Sections 20a and 214 of the Interstate Commerce Act, 49 U.S.C. §§ 20a and 314, to issue 500,000 shares of its authorized but unissued common stock, par value $1 per share. The application was filed pursuant to an agreement between Railway Express and The Greyhound Corporation (Greyhound) whereby the latter has agreed to buy the described 500,000 shares of stock from Railway Express at a price of $20 per share. Among other things, that agreement required, as a condition precedent to Railway Express's agreement to sell the 500,000 shares of its stock, that Greyhound offer to buy for $20 per share an additional 1,000,000 shares of the outstanding common stock from its railroad stockholders. It also provided for the adoption of a resolution by Railway Express's board of directors, which resolution was adopted on September 1, 1964, declaring the intention of Railway Express to consider seriously and work toward a long-term agreement between Railway Express and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service, and increase public receptivity

and patronage. Furthermore, the agreement provided, and Railway Express's board of directors so resolved on September 1, 1964, that Greyhound shall be permitted to name 20 percent of Railway Express's board of directors if it succeeds in buying the 500,000 shares of stock sought to be issued.

5. Railway Express's charter authorizes it to issue 2,576,000 shares of common stock, of which 1,999,188 shares are outstanding and owned by 60 railroads. The proposed issuance of 500,000 shares of common stock will bring Railway Express's total outstanding shares to 2,499,188. Should Greyhound acquire the involved 500,000 shares, a 20 percent interest in Railway Express, and succeed in buying the 1,000,000 additional shares from the railroads, it would then own 60 percent of Railway Express's stock.

[fol. 425] 6. Intervening plaintiffs, 12 motor common carriers, National Trailways, 17 motorbus companies, Freight Forwarders Institute, and 5 railroad stockholders of Railway Express all filed petitions with the Commission for leave to intervene in opposition to the application. Besides protesting the application, intervening plaintiffs, as did several other opposing intervenors, asked that a hearing be held by the Commission to determine whether Railway Express's proposed stock issuance meets the statutory requirements of Sections 20a and 214, particularly whether the sale of the stock to Greyhound would be compatible with the public interest and is necessary or appropriate for or consistent with the proper performance by Railway Express of service to the public, and to explore the question of control of Railway Express by Greyhound, implicit in the application.

7. A petition for leave to intervene was also filed by the Department of Justice, requesting the Commission to institute a proceeding to determine the lawfulness of the proposed stock transaction under Section 7 of the Clayton

Antitrust Act, and to consolidate Railway Express's application to issue the 500,000 shares for consideration with such a proceeding.

8. Southern Pacific Company, an opposing railroad stockholder of Railway Express, filed a complaint with the Interstate Commerce Commission, Docket No. 23374, alleging that the agreement between Railway Express and Greyhound and the proposed stock issuance contemplates the acquisition of control, or the power to exercise control or management of Railway Express by Greyhound. It asked the Commission to invoke the provisions of Section 5(7) of the Interstate Commerce Act, 49 U.S.C. § 5(7), and, after hearing and investigation, to require Railway Express to cease and desist from consummating the transaction.

9. Railway Express replied to the protests and petitions for leave to intervene in opposition to its application, urging primarily that its application be approved without further proceedings. In addition, Railway Express and Greyhound filed motions to dismiss and answers to the complaint of the Southern Pacific Company. Southern Pacific Company, in turn, replied to the motions to dismiss. The Commission granted all the petitions for leave to intervene.

10. By order served March 16, 1965, the Commission, Division 3, found that the issuance of the 500,000 shares of common stock by Railway Express was for a lawful [fol. 426] purpose under Sections 20a and 214, and authorized Railway Express to issue the shares of stock, providing an effective date 35 days from the date of service of the order. It summarily rejected intervenors' arguments in opposition to the application and found further that a hearing was not appropriate "at this time" to investigate whether or not the transaction might violate the provisions of Section 5 of the Interstate Commerce Act or Section 7

of the Clayton Antitrust Act. It dismissed the complaint filed by the Southern Pacific Company. A copy of the Commission's order is attached to the plaintiffs' complaint as part of the record before the Commission.

11. Intervening plaintiffs and other intervenors in opposition to the application, pursuant to the Commission's General Rules of Practice, filed a petition with the Commission seeking reconsideration of its order of March 16, 1965. We asked that the Commission vacate its order granting the application, and that it order the proceeding to be set down for hearing in order to determine whether the proposed issuance is in fact in conformity with the requirements of Sections 20a, 214, and 5 of the Interstate Commerce Act, Congress's national transportation policy, and Section 7 of the Clayton Antitrust Act. By order served June 4, 1965, Division 3, acting as an Appellate Division, denied these petitions. A copy of this order is attached to plaintiffs' complaint as part of the record.

12. By Section 17 of the Interstate Commerce Act, 49 U.S.C. §17, the order of Division 3 served June 4, 1965, is administratively final, and intervening plaintiffs have exhusted their administrative remedies.

Allegations Of Error

13. By its orders served March 16, 1965, and June 4, 1965, in Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* the defendant Interstate Commerce Commission acted unlawfully, arbitrarily, and capriciously, and abused its discretion in the following particulars:

(a) In refusing to exercise its authority under Section 5(7) to determine, after notice and hearing, whether or not the proposed transaction would result in Greyhound unlawfully acquiring control, or the power to control Railway Express, in violation of Section 5(4), as alleged by opposing intervenors, including 5 railroad stockholders, and implicit

in the application, the Commission failed to discharge its [fol. 427] duty under Section 12(1) of the Interstate Commerce Act, 49 U.S.C. § 12(1), to execute and enforce all the provisions of Part I of the Interstate Commerce Act.

(b) In refusing to institute a proceeding to determine whether Section 7 of the Clayton Antitrust Act would be violated by Greyhound's acquisition of Railway Express's stock under the circumstances and conditions outlined in Railway Express's application, the Commission failed in its duty under Section 11 of the Clayton Antitrust Act, 15 U.S.C. § 21, to enforce compliance with Section 7 of that Act by common carriers subject to the Interstate Commerce Act.

(c) The Commission's denial of the petitions of intervening plaintiffs and other opposing intervenors for a hearing to investigate whether the proposed transaction would violate Section 5(4) of the Interstate Commerce Act and Section 7 of the Clayton Antitrust Act, and would therefore be inconsistent with the statutory requirements of Sections 20a and 214, and to test the accuracy of Railway Express's contrary statements, constituted a capricious abuse of its discretion and deprived intervening plaintiffs, and the other parties opposing the application, of a fair opportunity to present evidence in opposition to the application, in violation of due process of law.

(d) The Commission's finding that Railway Express's proposed issuance of stock for sale to Greyhound meets the requirements of Section 20a and 214 is not based upon sufficient evidence to satisfy the statutory requirements of those sections and is legally deficient, because such finding is grounded upon unsubstantiated facts and self-serving statements by Railway Express and Greyhound.

Wherefore, intervening plaintiffs pray:

(a) That in accordance with Rule 4 of the Federal Rules of Civil Procedure, this Court order process to issue

against the defendants, United States of America and Interstate Commerce Commission;

(b) That in accordance with Section 2284(1) of Title 28 of the United States Code, this Court immediately notify the Chief Judge of the United States Court of Appeals for this circuit who shall designate two other judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court to hear and determine this action;

(c) That upon final hearing, the Court find that the [fol. 428] orders of the defendant Interstate Commerce Commission served March 16, 1965, and June 4, 1965, in the Commission's Docket No. 23324, are unlawful, null, and void;

(d) That the Court enter judgment to permanently suspend, enjoin, annul, and set aside the orders of the defendant Interstate Commerce Commission complained of herein, and that the Court remand this matter to the Commission for further proceedings consistent with the Court's opinion;

(e) That the Court grant such other and further relief in the premises as it deems just and proper.

Respectfully submitted,

Peter T. Beardsley, Richard R. Sigmon, Harry J. Jordan, R. Edwin Brady, 1616 P Street, N. W. Washington, D. C. 20036;

Roland and Rice, Rice, Carpenter & Carraway, 618 Perpetual Building, Washington 4, D. C.;

Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado, Attorneys for Intervening Plaintiffs.

Of Counsel: Jones, Meiklejohn, Kehl & Lyons, 420 Denver Club Building, Denver, Colorado.

Certificate of Service (omitted in printing).

[fol. 429]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

COMPLAINT—Filed July 14, 1965

Comes now Freight Forwarders Institute, an intervening plaintiff in the above-entitled cause, and for its action against defendants respectfully shows:

I

Intervening plaintiff is a nonprofit organization, the membership of which is composed of freight forwarders operating as such under permits issued by the Interstate Commerce Commission and subject to the jurisdiction of that body under Part IV of the Interstate Commerce Act (49 U.S. Code § 1001 to 1022, both inclusive).

Intervening plaintiff's members are in direct competition with Railway Express Agency (REA) and with Greyhound Corporation in the movement of package freight between points in the continental United States.

II

Intervening plaintiff was a party to one of the proceedings underlying this suit, viz., Finance Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* and filed pleadings and briefs therein with the said Commission.

[fol. 430]

III

Intervening plaintiff adopts and incorporates herein by reference, as though rewritten, all of the statements and

[File endorsement omitted]

allegations made in numbered paragraphs 3, 4, 5, 6 (so far as it relates to the proceedings in Finance Docket No. 23324), 8, 9 (adding that freight forwarders in the ordinary conduct of their business compete directly with both REA and Greyhound), 10, 12 (so far as it relates to Finance Docket No. 23324), 13, 15, and 16 (so far as it relates to Finance Docket No. 23324), and the prayer of plaintiffs, except so far as it relates to a temporary restraining order, since the Commission, by order dated June 16, 1965, taking note of this suit, postponed the effective date of its order of May 28, 1965, for an indefinite time.

IV

Intervening plaintiff additionally alleges that if this transaction is permitted by the Commission the end result will be the creation of a monopoly in favor of REA and Greyhound in the handling of less-than-carload (package) freight and destructive competitive practices in violation of the said Interstate Commerce Act.

Respectfully submitted,

Edward T. Lyons, Jr., 420 Denver Club Bldg., Denver, Colorado; Harry C. Ames, 527 Transportation Bldg., Washington, D. C. 20006; Giles Morrow, 1012 Fourteenth St., N.W., Washington, D. C. 20005, Attorneys for Intervening Plaintiff.

Of Counsel: Jones, Meiklejohn, Kehl & Lyons, 420 Denver Club Building, Denver, Colorado.

[fol. 431]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

COMPLAINT IN INTERVENTION—Filed July 16, 1965

Come Now Ringsby Truck Lines, Inc.; Navajo Freight Lines, Inc.; Denver Chicago Trucking Company, Inc.; Illinois-California Express, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Western Gillette, Inc.; IML Freight, Inc.; and Consolidated Copperstate Lines, intervening plaintiffs in this cause, by their attorneys, and for their action against defendants respectfully allege and show:

1.

This is a proceeding to enjoin, set aside, annul, and suspend, Orders entered on March 15, 1965, and May 28, 1965, by the Interstate Commerce Commission (hereinafter referred to as the "Commission") in administration proceedings identified as Finance Docket No. 23324, *Railway Express, Incorporated, Stock,* and Finance Docket No. 23374, *Southern Pacific Company* v. *Greyhound Corporation and Railway Express, Incorporated,* brought by The Denver and Rio Grande Western Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; and Southern Pacific Company.

2.

These intervening plaintiffs are corporations, as described in Exhibit A hereto attached and made a part

[File endorsement omitted]

hereof, and are common carriers of property by motor vehicle and are subject to the Interstate Commerce Act (49 U.S.C. §1, et seq.), in respect of their interstate operations.

Each of said plaintiffs competes over one or more of its authorized routes with Railway Express Agency, Incorporated, hereinafter referred to as "REA") and with Grey- [fol. 432] hound Corporation (hereinafter referred to as "Greyhound") or corporations controlled by it, in the transportation of property for hire.

3.

The United States of America was made a defendant in this proceeding pursuant to Title 28, United States Code, Section 2322. Defendant Interstate Commerce Commission is an agency of the United States, created pursuant to the Interstate Commerce Act (49 U.S.C. 31, et seq.).

4.

This is a civil action, and jurisdiction of this Court was invoked under Sections 1336, 2284, and 2321 through 2325, inclusive, of Title 28, United States Code.

5.

Venue lies in this judicial district under Section 1398 of Title 28, United States Code, because the principal office of an original plaintiff, The Denver and Rio Grande Western Railroad Company is in this district. These plaintiffs were permitted to intervene in Finance Docket No. 23324, orders in which are the subject of this action, by order of the Commission dated February 5, 1965, copy of which is attached hereto as Exhibit B and made a part hereof; and as parties in interest to said proceeding before the Commission, are entitled to intervene in this action as of right, pursuant to the provisions of United States Code, Title 28, §2323.

This controversy, insofar as these intervening plaintiffs are involved, arises out of a proceeding before the Commission in Finance Docket No. 23324 which was instituted by application filed on or about October 7, 1964, by REA under Sections 20a and 214 of the Interstate Commerce Act (49 U.S.C. §20a and 314), for authority to issue 500,000 shares, constituting about twenty percent, of REA's authorized common stock to Greyhound at the price of $20 per share upon the following terms and conditions:

(a) The REA By-Laws will be amended so that The Greyhound Corporation shall be permitted to name 20% of the REA Board of Directors.

(b) The REA Board shall adopt a resolution declaring the intention of refinancing, if necessary, the $27,-[fol. 433] 637,054 of outstanding 5% notes, issued originally to REA's stockholders, or otherwise securing the waiver or cancellation of the prohibition against payment of dividends.

(c) The REA Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage.

(d) The REA Board shall adopt a resolution declaring the intention to consider seriously at a later time the sale of some REA stock to airlines and/or the general public if and when conditions appear favorable to the best interests of REA as a company.

(e) The Greyhound Corporation shall offer to purchase up to 1,000,000 shares of the common stock of REA from present shareholders at a price of $20 per

share cash. Such offer to purchase will remain open and in full force and effect for a period of sixty days following the closing date of the transaction involving the 500,000 authorized unissued shares of REA.

(f) The offer of REA shall expire at 12:00 Noon on December 31, 1964.

(g) The offer of REA may be accepted immediately, subject to all necessary authorizations from the Interstate Commerce Commission and to approval by the shareholders of this corporation of (i) the issuance to The Greyhound Corporation pursuant to said offer of 500,000 shares of authorized but unissued common stock of this corporation and (ii) the amendments to the By-Laws of this corporation required by subparagraph (a) of said offer.

On or about October 30, 1964, Southern Pacific Company filed a complaint with the Commission, naming REA and Greyhound as defendants, and sought to have the proposed transaction for sale by REA of 500,000 shares of its common stock declared unlawful under Section 5(4) of the Interstate Commerce Act (49 U.S.C. §5(4)), unless an application were presented to and authority secured from the Commission under Section 5(2)(b) of the Act (49 U.S.C. §5(2)(b)). These intervening plaintiffs did not seek to intervene in the said complaint proceeding, designated Finance Docket No. 23374, nor did they participate therein before the Commission.

7.

Attached to the original complaint in this action are copies of the material records in the proceedings in Finance Docket 23324, duly certified to by the Secretary of the Commission, according to law (Title 49, U.S.C., §16(13)), which records are made a part of this complaint by reference, and are hereinafter referred to collectively as the "record" and respectively by the names of the documents comprising such record.

[fol. 434]

8.

Greyhound is a corporation having its principal place of business at Chicago, Illinois, and is a common carrier by express and motor vehicle, or controls common carriers by express or motor vehicle, and is engaged in the transportation of property and passengers between points in all states of the United States except Alaska and Hawaii and, as such, Greyhound is subject to the provisions of the Interstate Commerce Act.

9.

REA and Greyhound are competitors for the transportation of property between points in all states of the United States except Alaska and Hawaii.

10.

In the proceeding in Finance Docket No. 23324, these intervening plaintiffs filed a petition for leave to intervene and a request for formal hearing, and were permitted to intervene by order of the Commission dated February 5, 1965 (Exhibit B of this Complaint). Petitions for leave to intervene and protests in opposition requesting formal hearing were also filed by The Denver and Rio Grande Western Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, and Southern Pacific Company, Freight Forwarders Institute, representing freight forwarders, American Trucking Associations, Inc., Regular Common Carrier Conference, National Trailways Bus System, an association, and seventeen motor bus companies. The only party petitioning for leave to intervene in support of the application was Greyhound. The United States Department of Justice filed a petition for leave to intervene, requesting oral hearings, a prehearing conference, and consolidation with a proceed-

ing to determine the lawfulness of the proposed transaction under Section 7 of the Clayton Act. National Trailways Bus System and several motor bus companies, in their petitions requested an order requiring Greyhound to file an application under Section 5 of the Interstate Commerce Act, and requesting consolidation and hearing of such application on a common record with the application for authority to issue said stock. Finance Board No. 2 of the Commission certified the application to Division 3 for determination.

[fol. 435] 11.

The Commission held no hearings whatever in Finance Docket No. 23324 or in Finance Docket No. 23374, and by order entered March 15, 1965, by Division 3, in both of said cases, denied the petition of interveners for a hearing, dismissed the complaint in Finance Docket No. 23374, and in Finance Docket No. 23324, authorized REA to issue 500,000 shares of its common stock as prayed.

12.

On April 6, 1965 these intervening plaintiffs filed a petition to stay the effect of the Commission's order of March 15, 1965 pending filing of a petition for reconsideration. A similar petition was filed on April 1, 1965, by American Trucking Associations, Inc., and Regular Common Carrier Conference, and on or about April 8, 1965, by Freight Forwarders Institute. Within the time permitted by law, these intervening plaintiffs, jointly with the American Trucking Associations, Inc. and Regular Common Carrier Conference, filed a petition for reconsideration of the order of the Commission dated March 15, 1965, in which the Commission was requested to hold hearings in Finance Docket No. 23324 to determine whether the proposed stock issue was in conformity with the requirements of Section 5, 20a and 214 of the Interstate Commerce Act, the national transportation policy, and with Section 7 of the Clayton

Act. Petitions for reconsideration were also timely filed by The Denver and Rio Grande Western Railroad Company, Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company, St. Louis Southwestern Railway Company, and St. Louis Southwestern Railway Company of Texas, Freight Forwarders Institute, and Transcontinental Bus System, Inc., et al. On April 16, 1965, the Commission issued a notice stating that the Commission's Order of March 15, 1965, was stayed pending disposition of the matter. Finally, by Order entered May 28, 1965, the Commission, by Division 3 acting as an appellate division, denied the petitions for reconsideration of said Order of March 15, 1965, providing that it should become effective twenty days from May 28, 1965. Subsequently, a Corrected Order, entered May 28, 1965, was issued, directing that the Order of March 15, 1965, become effective twenty days from June 4, 1965.

[fol. 436] 13.

The Commission, in making and issuing said orders of March 15, 1965 and May 28, 1965 erred as a matter of law and in abuse of its discretion in the following particulars:

(a) In that the Commission failed and refused to conduct an investigative hearing required to determine, or to consider or determine, whether the effect of the acquisition by Greyhound of a twenty percent of the share capital of REA, issuance of which was authorized by its order of March 15, 1965, may be substantially to lessen competition in, or tend to create a monopoly of, the transportation of express or other freight traffic in the United States or any section thereof, in violation of Section 7 of the Clayton Act (15 U.S.C. §18).

(b) In that the Commission's findings that "... an investigation of whether the proposed transaction, or further prospective agreements between applicant

(REA) and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time . . . " was an abuse of its discretion, and an abdication of the authority and responsibility committed to it for enforcement, with respect to common carriers, of the provisions of Section 7 of the Clayton Act, in violation of Section 11 of the Clayton Act (15 U.S.C. §21).

(c) In that the Commission's report and order failed to make findings requisite to support its conclusion of law that the proposed issuance of stock by REA " . . . is for a lawful object within its corporate purposes and compatible with the public interest . . . " particularly findings that the probable effect of the acquisition would not be substantially to lessen competition or to tend to creation of a monopoly, in light of the avowed non-investment purpose of the acquisition, implicit in the terms and conditions of the issuance set forth in paragraph 6 of this complaint.

[fol. 437] (d) In that the Commission failed and refused, in violation of due process of law, and despite its duty under Sections 20a(2) and 214 of the Interstate Commerce Act, 49 U.S.C., §§20a(2) and 314, to investigate the purposes and uses of the proposed issue and the proceeds thereof, to conduct hearings as requested by plaintiffs and other parties in Finance Docket No. 23324 desiring to present evidence in opposition to the application therein, in order to determine whether the transaction set forth in paragraph 6 hereof was in violation of Section 5(4) of the Interstate Commerce Act.

(e) In that the Commission's findings set forth in its order of March 15, 1965, in support of its approval of the application of REA in Finance Docket No. 23324 are deficient in that they were made upon mere allegations in the pleadings without the benefit of hearings,

and without benefit of evidence in opposition, and consequently were not supported by substantial evidence on the record considered as a whole.

(f) In that the Commission has failed to set forth any rational explanation that would disclose the basis upon which the findings and conclusions of its order of March 15, 1965 were reached.

14.

If the Orders of March 15, 1965, and May 28, 1965, are enforced, said Orders will cause plaintiffs to suffer immediate and irreparable damage, in that:

(a) Once the transaction is approved and consummated, it would be extremely difficult, if not impossible, to secure the divestment of control by Greyhound and to restore the status quo at a later date and, in any event, plaintiffs would be compelled to incur substantial expense in lengthy and complicated legal proceedings to that end.

(b) If said orders of March 15, 1965 and of May 28, 1965 are permitted to become effective, and Greyhound is permitted to acquire a twenty percent stock interest [fol. 438] in REA, competition for transportation of express traffic would be substantially lessened and a tendency toward monopoly of such transportation set in motion which would handicap and in time foreclose the competition of these plaintiffs for transportation of express and other traffic.

Wherefore, plaintiffs pray:

1. That process may issue against defendants, the United States of America and the Interstate Commerce Commission.

2. That a Court constituted as required by Title 28 of the United States Code, Sections 2284 and 2321-2325, consisting of three judges, be convened.

3. That the Court permanently set aside, annul and suspend the Commission's Orders and grant a permanent injunction against their operation, enforcement and execution.

4. That plaintiffs recover their proper costs.

5. That plaintiffs have such other and further relief as may be appropriate.

David Axelrod, 39 South LaSalle Street, Chicago, Illinois 60603; Eugene T. Liipfert, Berl I. Bernhard, 1035 Universal Building North, Washington, D. C. 20009; Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado 80202; Attorneys for Intervening Plaintiffs.

Of Counsel:

Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603.

Verner, Liipfert and Bernhard, 1035 Universal Building North, Washington, D. C. 20009.

Jones, Meiklejohn, Kehl & Lyons, 420 Denver Club Building, Denver, Colorado.

[fol. 439]

EXHIBIT A TO COMPLAINT IN INTERVENTION

Plaintiff Ringsby Truck Lines, Inc. is a corporation organized under the laws of the State of Nebraska, having its principal office at Denver, Colorado, and operating as a motor common carrier of property in eleven states.

Plaintiff Navajo Freight Lines, Inc. is a corporation organized under the laws of the State of New Mexico, having its principal office in Denver, Colorado, and operating as a motor common carrier of property in fourteen states.

Plaintiff Denver Chicago Trucking Co., Inc, is a corporation organized under the laws of the State of Nebraska, having its principal office at Denver, Colorado, and operating as a motor common carrier of property in twenty-one states.

Plaintiff Illinois-California Express, Inc. is a corporation organized under the laws of the State of Nebraska, having its principal office in Denver, Colorado, and operating as a motor common carrier of property in twelve states.

Plaintiff Pacific Intermountain Express Co. is a corporation organized under the laws of the State of Nevada, having its principal office in Oakland, California, and operating as a motor common carrier of property in sixteen states.

Plaintiff Transcon Lines is a corporation organized under the laws of the State of California, having its principal office at Los Angeles, California, and operating as a motor common carrier of property in thirteen states.

Plaintiff Watson-Wilson Transportation System, Inc. is a corporation organized under the laws of the State of Nebraska, having its principal office at Omaha, Nebraska, and operating as a motor common carrier of property in sixteen states.

Plaintiff Western Gillette, Inc. is a corporation organized under the laws of the State of California, having its principal office at Los Angeles, California, and operating as a motor common carrier of property in twelve states.

[fol. 440] Plaintiff IML Freight, Inc. is a corporation organized under the laws of the State of Utah, having its principal office at Salt Lake City, Utah, and operating as a motor common carrier of property in fifteen states.

Plaintiff Consolidated Copperstate Lines is a corporation organized under the laws of the State of California, having its principal office at Montebello, California, and operating as a motor common carrier of property in six states.

[fol. 441]

EXHIBIT B TO COMPLAINT IN INTERVENTION

SERVICE DATE:
February 17, 1965

ORDER

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED—
STOCK ISSUANCE

In the Matter of Petition for Leave to Intervene

PRESENT: Kenneth H. Tuggle, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding and petition for leave to intervene on behalf of Denver Chicago Trucking Company, Inc., Consolidated Freightways Corporation of Delaware and Missouri Consolidated Freightways Corporation, Illinois-California Express, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Transcon Lines, in its own right and as operator of Indianapolis-Kansas City Motor Express Co. and Decatur Seaway Motor Express, Inc., Watson-Wilson Transportation System, Inc., Ringsby Truck Lines, Inc., Western Gillette, Inc., Interstate Motor Lines, Inc., T.I.M.E. Freight, Inc., and Consolidated Copperstate Lines; and good cause appearing:

It is ordered, That said petitioners be, and they are hereby, permitted to intervene in this proceeding.

Dated at Washington, D. C. this 5th day of February, By the Commission, Commissioner Tuggle.

BERTHA F. ARMES
Acting Secretary.

(SEAL)

[fol. 442]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

COMPLAINT OF INTERVENING PLAINTIFFS—
Filed November 10, 1965

Now comes Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Bayshore Buslines, Inc., Continental Bus System, Inc., Continental Crescent Lines, Inc., Continental Panhandle Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Inc., Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Bus Lines, Inc., and Muscatine, Davenport and Clinton Bus Company, intervening Plaintiffs in the above entitled and numbered cause, and for cause of action would respectfully show:

I.

Transcontinental Bus System, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity No. MC-109780 and subs thereunder. Transcontinental is a Delaware corporation, with principal offices located at 315 Continental Avenue, Dallas, Dallas County, Texas.

American Buslines, Inc., is a common carrier of passengers, their baggage, express and newspapers in the

[File endorsement omitted]

same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-2890 and subs thereunder. American is a Delaware corporation, with principal offices located at 1805 Leavenworth Street, Omaha, Nebraska.

[fol. 443] Arkansas Motor Coaches Ltd., Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-60026 and subs thereunder. Arkansas is an Arkansas corporation, with principal offices located at 106 East Markham, Little Rock, Arkansas.

Bayshore Buslines, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity No. MC-11929 and subs thereunder. Bayshore is a Texas corporation, with principal offices located at 425 Bolton Avenue, Alexandria, Louisiana.

Continental Bus System, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-107586 and subs thereunder. Continental is a Tennessee corporation, with principal offices located at 315 Continental Avenue, Dallas, Texas.

Continental Crescent Lines, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Public Convenience and Necessity, No. MC-114271 and subs thereunder. Crescent is a Dela-

ware corporation, with principal offices located at 425 Bolton Avenue, Alexandria, Louisiana.

Continental Panhandle Lines, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-8742 and subs thereunder. Panhandle is a Texas corporation, with principal offices located at 400 Monroe Street, Amarillo, Texas.

Continental Southern Lines, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. [fol. 444] MC-29957 and subs thereunder. Southern is a Louisiana corporation, with principal offices located at 425 Bolton Avenue, Alexandria, Louisiana.

Continental Tennessee Lines, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-55312 and subs thereunder. Tennessee is a Delaware corporation, with principal offices located at 418 Fifth Avenue, South, Nashville, Tennessee.

Denver-Colorado Springs-Pueblo Motorway is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-28462 and subs thereunder. D.C.S.P. is a Colorado corporation, with principal offices located at 1669 Broadway, Denver, Colorado.

Denver-Salt Lake-Pacific Stages, Inc., is a common carrier of passengers, their baggage, express and newspapers

in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-1097 and subs thereunder. D.S.L.P. is a Colorado corporation, with principal offices located at 1669 Broadway, Denver, Colorado.

Continental Pacific Lines, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-89037 and subs thereunder. Pacific is a California corporation, with principal offices located at 1501 South Central Avenue, Los Angeles, California.

Midwest Buslines, Inc. is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-61616 and subs thereunder. Midwest is a Delaware corporation, with principal offices located at 433 West Washington Avenue, North Little Rock, Arkansas.

Muscatine, Davenport and Clinton Bus Co., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and [fol. 445] Necessity, No. MC-107562 and subs thereunder. M.D.&C. is an Iowa corporation, with principal offices located at 1805 Leavenworth Street, Omaha, Nebraska.

Smoky Mountain Stages, Inc. is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-61598 and subs thereunder. Smoky is a North Carolina

corporation, with principal offices located at 417 West Fifth Street, Charlotte, North Carolina.

Tennessee Trailways, Inc., is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-8500 and subs thereunder. Tennessee Trailways is a Virginia corporation, with principal offices located at 710 Sevier Avenue, Knoxville, Tennessee.

Union Bus Lines, Inc. is a common carrier of passengers, their baggage, express and newspapers in the same vehicle with passengers, over regular routes, under authority granted to it by the Interstate Commerce Commission in Certificates of Convenience and Necessity, No. MC-57298 and subs thereunder. Union is a Texas corporation, with principal offices located at 315 Continental Avenue, Dallas, Texas.

Under their authority, the intervening Plaintiffs operate motor buses throughout the United States, and are in direct competition with Railway Express Agency, Inc., and The Greyhound Corporation for the movement of package express between points within the continental United States.

II.

Intervening Plaintiffs were parties of record in the proceedings before the Interstate Commerce Commission in Finance Docket No. 23324, *Railway Express Agency, Inc., Stock,* and actively and continuously participated therein. The Order in Finance Docket No. 23324 is one of the Orders of the Interstate Commerce Commission which the Plaintiffs herein seek to set aside.

III.

Intervening Plaintiffs adopt and incorporate herein by reference, as though rewritten, all of the statements and

allegations made by Plaintiffs in numbered paragraphs 1, [fol. 446] 3, 4, 5, 6, (so far as it relates to the proceedings in Finance Docket No. 23324), 8, 9, 10, 12 (so far as it relates to Finance Docket No. 23324), 13, 15, 16 (so far as it relates to Finance Docket No. 23324), and Plaintiffs prayer, except as it relates to a temporary authority order, of Plaintiffs' Complaint.

Respectfully submitted,

Warren A. Goff, D. Paul Stafford, 315 Continental Avenue, Dallas, Texas 75207, Attorneys for Movants.

Of Counsel: John R. Barry, Barry and Boyle, Attorneys at Law, 946 Metropolitan Building, Denver, Colorado.

Certificate of Service (omitted in printing).

[fol. 447]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, and SOUTHERN PACIFIC COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

RAILWAY EXPRESS AGENCY, INCORPORATED, Intervenor-Defendant.

ANSWER OF INTERVENOR-DEFENDANT, RAILWAY EXPRESS AGENCY, INCORPORATED—Filed June 23, 1965

Intervenor-Defendant, Railway Express Agency, Incorporated (REA), for its answer to the complaint herein:

1. Admits the averments of paragraphs 1 through 5, 11 and 15 thereof.

2. Admits the averments of paragraph 6 thereof and respectfully refers the Court to the applications referred to therein for their content.

3. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7 thereof. Counsel for REA will at their

[File endorsement omitted]

first opportunity determine whether the record described in paragraph 7 is complete and accurate.

4. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments [fol. 448] of paragraph 8 thereof, except admits that the Greyhound Corporation (Greyhound) is a corporation and controls at least one corporation engaged in the transportation of property and passengers between points in certain states and is subject to some of the provisions of the Interstate Commerce Act.

5. Denies each and every averment of paragraph 9 thereof except admits that Greyhound and REA are competitors in a limited sense for the transportation of property between certain points in all states of the United States, except Alaska and Hawaii, and, in this respect, REA alleges that Greyhound is limited in its competition with REA in that Greyhound can only transport property on its passenger vehicles and that, as a result, there is a limitation upon size, weight, volume and character of property which it can transport. Accordingly, the competition between REA and Greyhound for the transportation of such small shipments is nominal. Moreover, in the aggregate the volume of small shipments transported by both REA and Greyhound is also nominal as compared to the total of all such shipments.

6. Denies each and every averment of paragraph 10 thereof, except that the parties named therein filed petitions for leave to intervene in Finance Docket No. 23324 and respectfully refers the Court thereto for their content, that some of the parties requested a hearing and that Finance Board No. 2 of the Commission certified the application in Finance Docket No. 23324 to Division 3 of the Commission for determination.

7. With respect to the averments of paragraph 12 thereof, respectfully refers the Court to the records and orders of the Commission for the full and complete con-

tent, and further avers that, pursuant to the provisions of Section 20a(6) of the Interstate Commerce Act, which provides in part, that "the Commission may hold hearings, if it sees fit . . . ", the Commission was not required to hold [fol. 449] a hearing with respect to the application in Finance Docket No. 23324, and further avers that, pursuant to the provisions of Section 5(7) of the Interstate Commerce Act, the Commission was not authorized to grant the relief requested in Finance Docket No. 23374, and that in any case the relief requested therein was clearly premature.

8. Admits the averments of paragraph 13 thereof, except respectfully refers the Court to the petitions and orders referred to therein for their content and conditions thereof.

9. Denies the averments of paragraphs 14, 16 and 18 thereof.

Wherefore, Intervenor-Defendant, Railway Express Agency, Incorporated, demands judgment dismissing the complaint together with expenses and disbursements.

Dated June 23, 1965.

Hodges, Silverstein & Harrington, Joseph G. Hodges, Attorneys for Intervenor-Defendant, Railway Express Agency, Incorporated, 1360 Denver Club Building, Denver, Colorado 80202, 534-0211.

Of Counsel:

William J. Taylor, 219 E. 42nd Street, New York, New York 10017.

Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York 10005.

[fol. 450]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF INTERVENOR-DEFENDANT THE GREYHOUND CORPORATION—Filed July 16, 1965

Comes Now intervenor-defendant The Greyhound Corporation and for answer to the complaint herein respectfully admits, denies, and alleges as follows:

1. Admits the allegations of Paragraph 1 of said complaint.

2. Admits the allegations of Paragraph 2 of said complaint.

3. Admits the allegations of Paragraph 3 of said complaint.

[fol. 451] 4. Admits the allegations of Paragraph 4 of said complaint.

5. Admits the allegations of Paragraph 5 of said complaint.

6. Admits the allegations of Paragraph 6 of said complaint, except that this intervenor-defendant refers the Court to the application and the complaint referred to in said paragraph for their contents.

7. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 of said complaint, since the copy of the complaint served upon this intervenor-defendant did not have the accompanying material referred to in said Paragraph 7.

[File endorsement omitted]

8. Answering the allegations of Paragraph 8 of said complaint, admits that this intervenor-defendant The Greyhound Corporation has its principal place of business in Chicago, Illinois, and that it owns all of the capital stock of Greyhound Lines, Inc., a common carrier by bus engaged in the transportation of property and passengers between points in all states of the United States, except Alaska and Hawaii, and that as such said Greyhound Lines, Inc., is subject to the provisions of the Interstate Commerce Act.

9. Answering the allegations of Paragraph 9 of said complaint, this intervenor-defendant admits that REA and Greyhound Lines, Inc., are competitors in a limited sense for the transportation of property between certain points in the United States, except Alaska and Hawaii, and in this behalf alleges that Greyhound Lines, Inc., is limited in its competition with REA in that it can only transport property on its passenger vehicles and that as a result there is a limitation upon the size, weight, volume, and [fol. 452] character of property which it can transport. This intervenor-defendant further alleges that in the transportation of small shipments in the United States Greyhound Lines, Inc., handles substantially less than 1% of the total, REA handles approximately 2% of the total, and the remaining 97+% is handled by truckers, freight forwarders, railroads, and the United States Post Office through its Parcel Post, so that presently the competition between REA and Greyhound Lines, Inc., for the transportation of small shipments is nominal.

10. Admits the allegations of Paragraph 10 of said complaint, except that this intervenor-defendant respectfully refers the Court to the petitions referred to in said paragraph for the content of said petitions.

11. Admits the allegations of Paragraph 11 of said complaint.

12. Admits the allegations of Paragraph 12 of said complaint, except that this intervenor-defendant refers the

Court to the orders of the Commission for the content of said orders.

13. Admits the allegations of Paragraph 13 of said complaint, except that this intervenor-defendant refers the Court to the petitions and orders referred to therein for their contents.

14. Denies the allegations of Paragraph 14 of said complaint.

15. Admits the allegations of Paragraph 15 of said complaint.

16. Denies the allegations of Paragraph 16 of said complaint.

[fol. 453] 17. Denies the allegations of Paragraph 17 of said complaint.

18. Denies the allegations of Paragraph 18 of said complaint.

Wherefore, intervenor-defendant The Greyhound Corporation prays judgment dismissing the complaint, together with its expenses and disbursements.

Dated: July 12, 1965.

Dawson, Nagel, Sherman & Howard, By Winston S. Howard, A Member of the Firm, Attorneys for Intervenor-Defendant The Greyhound Corporation, 1900 First National Bank Bldg., Denver, Colorado 80202.

Of Counsel:

McCutchen, Doyle, Brown, Trautman & Enersen, 601 California Street, San Francisco, California 94108.

[fol. 454] Certificate of Mailing (omitted in printing).

[fol. 455]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

AMENDED ANSWER OF INTERVENOR-DEFENDANT RAILWAY EXPRESS AGENCY, INCORPORATED—Filed July 12, 1965

Intervenor-Defendant, Railway Express Agency, Incorporated (REA), for its amended answer to the complaint herein:

1. Admits the averments of paragraphs 1 through 5, 11 and 15 thereof.

2. Admits the averments of paragraph 6 thereof and respectfully refers the Court to the applications referred to therein for their content.

3. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7 thereof. Counsel for REA will at their first opportunity determine whether the record described in paragraph 7 is complete and accurate.

[fol. 456] 4. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 8 thereof, except admits that the Greyhound Corporation (Greyhound) is a corporation and controls at least one corporation engaged in the transportation of property and passengers between points in certain states and is subject to some of the provisions of the Interstate Commerce Act.

5. Denies each and every averment of paragraph 9 thereof except admits that Greyhound and REA are com-

[File endorsement omitted]

petitors in a limited sense for the transportation of property between certain points in all states of the United States, except Alaska and Hawaii, and, in this respect, REA alleges that Greyhound is limited in its competition with REA in that Greyhound can only transport property on its passenger vehicles and that, as a result, there is a limitation upon size, weight, volume and character of property which it can transport. Accordingly, the competition between REA and Greyhound for the transportation of such small shipments is nominal. Moreover, in the aggregate the volume of small shipments transported by both REA and Greyhound is also nominal as compared to the total of all such shipments.

6. Denies each and every averment of paragraph 10 thereof, except that the parties named therein filed petitions for leave to intervene in Finance Docket No. 23324 and respectfully refers the Court thereto for their content, that some of the parties requested a hearing and that Finance Board No. 2 of the Commission certified the application in Finance Docket No. 23324 to Division 3 of the Commission for determination.

7. With respect to the averments of paragraph 12 thereof, respectfully refers the Court to the records and [fol. 457] orders of the Commission for the full and complete content, and further avers that, pursuant to the provisions of Section 20a(6) of the Interstate Commerce Act, which provides in part, that "the Commission may hold hearings, if it sees fit . . .", the Commission was not required to hold a hearing with respect to the application in Finance Docket No. 23324, and further avers that, pursuant to the provisions of Section 5(7) of the Interstate Commerce Act, the Commission was not authorized to grant the relief requested in Finance Docket No. 23374, and that in any case the relief requested therein was clearly premature.

8. Admits the averments of paragraph 13 thereof, except respectfully refers the Court to the petitions and orders referred to therein for their content and conditions thereof.

9. Denies the averments of paragraphs 14 and 16 through 18 thereof.

Wherefore, Intervenor-Defendant, Railway Express Agency, Incorporated, demands judgment dismissing the complaint together with expenses and disbursements.

Dated July 12, 1965.

Hodges, Silverstein & Harrington, By Joseph G. Hodges, Attorneys for Intervenor-Defendant, Railway Express Agency, Incorporated, 1360 Denver Club Building, Denver, Colorado 80202, 534-0211.

Of Cousel:

William J. Taylor, 219 E. 42nd Street, New York, New York 10017;

Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York 10005.

[fol. 458]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF INTERVENOR-DEFENDANT THE GREYHOUND CORPORATION TO THE COMPLAINT OF INTERVENING PLAINTIFFS AMERICAN TRUCKING ASSOCIATIONS, INC., AND REGULAR COMMON CARRIER CONFERENCE—Filed August 12, 1965

Comes Now intervenor-defendant The Greyhound Corporation and for answer to the complaint of intervening plaintiffs American Trucking Associations, Inc., and Regu-

[File endorsement omitted]

lar Common Carrier Conference respectfully admits, denies and alleges as follows:

1. Admits the allegations of Paragraph 1 of said complaint.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of said complaint.

3. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3 of said complaint.

4. Admits the allegations of Paragraph 4 of said complaint, except that this intervenor-defendant respectfully refers the Court to the application referred to in said paragraph for the contents of said application.

[fol. 459] 5. Admits the allegations of Paragraph 5 of said complaint, and in this behalf alleges that the railroad stockholders of Railway Express Agency, Incorporated, have a right of first refusal to buy the 1,000,000 additional shares referred to in said paragraph.

6. Admits the allegations of Paragraph 6 of said complaint, except that this intervenor-defendant respectfully refers the Court to the petitions referred to in said paragraph for the contents of said petitions.

7. Admits the allegations of Paragraph 7 of said complaint, except that this intervenor-defendant respectfully refers the Court to the petition referred to in said paragraph for the contents of said petition.

8. Admits the allegations of Paragraph 8 of said complaint, except that this intervenor-defendant respectfully refers the Court to the complaint referred to in said paragraph for the contents of said complaint.

9. Admits the allegations of Paragraph 9 of said complaint, except that this intervenor-defendant respectfully refers the Court to the replies and motions referred to in

said paragraph for the contents of said replies and said motions.

10. Admits the allegations of Paragraph 10 of said complaint, except that this intervenor-defendant respectfully refers the Court to the order of the Commission referred to in said paragraph for the contents of said order.

11. Admits the allegations of Paragraph 11 of said complaint, except that this intervenor-defendant respectfully refers the Court to the petitions for reconsideration and order of the Commission referred to in said paragraph for the contents of said petitions and said order.

[fol. 460] 12. Admits the allegations of Paragraph 12 of said complaint.

13. Denies the allegations of Paragraph 13 of said complaint.

Wherefore, intervenor-defendant The Greyhound Corporation prays judgment dismissing the complaint, together with its expenses and disbursements.

Dated: August 12, 1965.

Dawson, Nagel, Sherman & Howard, By Winston S. Howard, A Member of the Firm, Attorneys for Intervenor-Defendant, The Greyhound Corporation, 1900 First National Bank Bldg., Denver, Colorado 80202.

Of Counsel:

McCutchen, Doyle, Brown, Trautman & Enersen, 601 California Street, San Francisco, California 94108.

[fol. 461]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF INTERVENOR-DEFENDANT THE GREYHOUND CORPORATION TO THE COMPLAINT IN INTERVENTION OF RINGSBY TRUCK LINES, INC., ET AL.—Filed August 12, 1965

Comes Now intervenor-defendant The Greyhound Corporation and for answer to the complaint in intervention of Ringsby Truck Lines, Inc., et al., respectfully admits, denies and alleges as follows:

1. Admits the allegations of Paragraph 1 of said complaint.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of said complaint.

3. Admits the allegations of Paragraph 3 of said complaint.

4. Admits the allegations of Paragraph 4 of said complaint.

5. Admits the allegations of Paragraph 5 of said complaint.

[fol. 462] 6. Admits the allegations of Paragraph 6 of said complaint, except that this intervenor-defendant refers the Court to the application and the complaint referred to in said paragraph for the contents of said application and said complaint.

7. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations

[File endorsement omitted]

of Paragraph 7 of said complaint since the copy of the original complaint in this action served upon this intervenor-defendant did not have the attached material referred to in said Paragraph 7.

8. Answering the allegations of Paragraph 8 of said complaint, admits that this intervenor-defendant The Greyhound Corporation has its principal place of business in Chicago, Illinois, and that it owns all of the capital stock of Greyhound Lines, Inc., a common carrier by bus engaged in the transportation of property and passengers between points in all states of the United States, except Alaska and Hawaii, and that as such said Greyhound Lines, Inc., is subject to the provisions of the Interstate Commerce Act.

9. Answering the allegations of Paragraph 9 of said complaint, this intervenor-defendant admits that REA and Greyhound Lines, Inc., are competitors in a limited sense for the transportation of property between certain points in the United States, except Alaska and Hawaii, and in this behalf alleges that Greyhound Lines, Inc., is limited in its competition with REA in that it can only transport property on its passenger vehicles and that as a result [fol. 463] there is a limitation upon the size, weight, volume, and character of property which it can transport. This intervenor-defendant further alleges that in the transportation of small shipments in the United States, Greyhound Lines, Inc., handles substantially less than 1% of the total, REA handles approximately 2% of the total, and the remaining 97+% is handled by truckers, freight forwarders, railroads, and the United States Post Office through its Parcel Post, so that presently the competition between REA and Greyhound Lines, Inc., for the transportation of small shipments is nominal.

10. Admits the allegations of Paragraph 10 of said complaint, except that this intervenor-defendant respectfully refers the Court to the petitions referred to in said paragraph for the contents of said petitions.

11. Admits the allegations of Paragraph 11 of said complaint, except that this intervenor-defendant respectfully refers the Court to the order of the Commission referred to in said paragraph for the contents of said order.

12. Admits the allegations of Paragraph 12 of said complaint, except that this intervenor-defendant respectfully refers the Court to the petitions and orders referred to in said paragraph for the contents of said petitions and said orders.

13. Denies the allegations of Paragraph 13 of said complaint.

14. Denies the allegations of Paragraph 14 of said complaint.

Wherefore, intervenor-defendant The Greyhound Corporation prays judgment dismissing the complaint together [fol. 464] with its expenses and disbursements.

Dated: August 12, 1965.

Dawson, Nagel, Sherman & Howard, By Winston S. Howard, A Member of the Firm, Attorneys for Intervenor-Defendant, The Greyhound Corporation, 1900 First National Bank Bldg., Denver, Colorado 80202.

Of Counsel:

McCutchen, Doyle, Brown, Trautman & Enersen, 601 California Street, San Francisco, California 94108.

[fol. 465]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF INTERVENOR-DEFENDANT THE GREYHOUND CORPORATION TO COMPLAINT OF INTERVENING PLAINTIFF FREIGHT FORWARDERS INSTITUTE—August 12, 1965

Comes Now intervenor-defendant The Greyhound Corporation and for answer to the complaint of intervening plaintiff Freight Forwarders Institute respectfully admits, denies and alleges as follows:

I

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph I of said complaint.

II

Admits the allegations of Paragraph II of said complaint.

III

Since said intervening plaintiff in Paragraph III of its said complaint adopts and incorporates herein by reference all of the statements and allegations made in Paragraphs 3, [fol. 466] 4, 5, 6, 8, 9, 10, 12, 13, 15 and 16 of the original complaint on file herein, this intervenor-defendant hereby adopts and incorporates herein by reference its answer to said statements and allegations as set forth in Paragraphs 3, 4, 5, 6, 8, 9, 10, 12, 13, 15 and 16 of its answer to said original complaint.

IV

Denies the allegations of Paragraph IV of said complaint and in this behalf this intervenor-defendant realleges that

in the transportation of small shipments in the United States, its subsidiary Greyhound Lines, Inc., handles substantially less than 1% of the total, REA handles approximately 2% of the total, and the remaining 97+% is handled by truckers, freight forwarders, railroads, and the United States Post Office through its Parcel Post.

Wherefore, intervenor-defendant The Greyhound Corporation prays judgment dismissing the complaint of intervening plaintiff Freight Forwarders Institute, together with its expenses and disbursements.

Dated: August 12, 1965.

Dawson, Nagel, Sherman & Howard, By Winston S. Howard, A Member of the Firm, Attorneys for Intervenor-Defendant, The Greyhound Corporation, 1900 First National Bank Bldg., Denver, Colorado 80202.

Of Counsel:

McCutchen, Doyle, Brown, Trautman & Enersen, 601 California Street, San Francisco, California 94108.

[fol. 467]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF INTERVENOR-DEFENDANT RAILWAY EXPRESS AGENCY, INCORPORATED TO COMPLAINT OF INTERVENOR-PLAINTIFFS AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.—Filed August 16, 1965

Intervenor-Defendant, Railway Express Agency, Incorporated (REA), for its answer to the complaint of Intervenor-Plaintiffs, American Trucking Associations, Inc., et al., herein:

1. Admits the averments of paragraphs 1 through 3, 5 and 12 thereof.

2. Admits the averments of paragraph 4 thereof and respectfully refers the Court to the application referred to therein for its content.

3. Denies each and every averment of paragraphs 6 and 7 thereof, except that the parties named therein filed petitions for leave to intervene in Finance Docket No. 23324, and respectfully refers the Court thereto for their content, and that some of the parties, including Intervenor-Plaintiffs herein, requested a hearing.

[fol. 468] 4. Denies each and every averment of paragraph 8 thereof except that Southern Pacific Company, a railroad stockholder of REA, filed a complaint in Finance Docket No. 23374, and respectfully refers the Court thereto for its terms.

5. Admits the averments of paragraph 9 thereof except respectfully refers the Court to the replies, motions and

[File endorsement omitted]

the orders of the Interstate Commerce Commission (Commission) for their complete content.

6. With respect to the averments of paragraphs 10 and 11 thereof, respectfully refers the Court to the records and orders of the Commission for the full and complete content thereof, and further avers that, pursuant to the provisions of Section 20a(6) of the Interstate Commerce Act, which provides in part that "the Commission may hold hearings, if it sees fit . . .", the Commission was not required to hold a hearing with respect to the application in Finance Docket No. 23324; that, pursuant to the provisions of Section 5(7) of the Interstate Commerce Act, the Commission was not authorized to grant the relief requested in Finance Docket No. 23374; and that the relief requested therein was clearly premature.

7. Denies each and every averment of paragraph 13 thereof.

Wherefore, Intervenor-Defendant, REA, demands judgment dismissing the complaint together with expenses and disbursements.

August 16, 1965.

Hodges, Silverstein & Harrington, By Joseph G. Hodges, Attorneys for Intervenor-Defendant, Railway Express Agency, Incorporated, 1360 Denver Club Building, Denver, Colorado 80202, 534-0211.

Of Counsel:

William J. Taylor, Esq., 219 East 42nd Street, New York 10017.

Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York 10005.

[fol. 469]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF INTERVENOR-DEFENDANT, RAILWAY EXPRESS AGENCY, INCORPORATED TO COMPLAINT OF INTERVENOR-PLAINTIFFS RINGSBY TRUCK LINES, INC., ET AL.— Filed August 16, 1965

Intervenor-Defendant, Railway Express Agency, Incorporated (REA), for its answer to the complaint of Intervenor-Plaintiffs, Ringsby Truck Lines, Inc., et al., herein:

1. Admits the averments of paragraphs 1 and 3 through 5 thereof.

2. Admits the averments of the first sentence of paragraph 2 thereof and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments thereof except that one or more Intervenor-Plaintiffs herein competes to a limited extent with REA or the Greyhound Corporation (Greyhound), or one or more corporations controlled by Greyhound, in the transportation of property for hire.

3. Admits the averments of paragraph 6 thereof and respectfully refers the Court to the applications referred [fol. 470] to therein for their content.

4. With respect to paragraph 7 thereof, denies that copies of all the material records in the proceedings in Finance Docket No. 23324 are attached to the original complaint in this action and avers that additional material records in said proceedings, duly certified by the Secretary of the Interstate Commerce Commission (Commission), according to law (Title 49 U.S.C. § 16(13)), will be filed with this Court by counsel for REA in the very near future.

[File endorsement omitted]

5. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 8 thereof, except admits that Greyhound is a corporation and controls at least one corporation engaged in the transportation of property and passengers between points in certain states and is subject to some of the provisions of the Interstate Commerce Act.

6. Denies each and every averment of paragraph 9 thereof except admits that Greyhound and REA are competitors in a limited sense for the transportation of property between certain points in all states of the United States, except Alaska and Hawaii, and, in this respect, REA alleges that Greyhound is limited in its competition with REA in that Greyhound can only transport property on its passenger vehicles and that, as a result, there is a limitation upon size, weight, volume and character of property which it can transport. Accordingly, the competition between REA and Greyhound for the transportation of such small shipments is nominal. Moreover, in the aggregate the volume of small shipments transported by both REA and Greyhound is also nominal as compared to the total of all [fol. 471] such shipments.

7. Denies each and every averment of paragraph 10 thereof, except that the parties named therein filed petitions for leave to intervene in Finance Docket No. 23324 and respectfully refers the Court thereto for their content; that some of the parties, including intervenor-Plaintiff herein, requested a hearing; and that Finance Board No. 2 of the Commission certified the application in Finance Docket No. 23324 to Division 3 of the Commission for determination.

8. With respect to the averments of paragraph 11 thereof, respectfully refers the Court to the records and orders of the Commission for the full and complete content thereof, and further avers that, pursuant to the provisions of Section 20a(6) of the Interstate Commerce Act, which provides in part, that "the Commission may hold hearings,

if it seems fit . . .", the Commission was not required to hold a hearing with respect to the application in Finance Docket No. 23324; that, pursuant to the provisions of Section 5(7) of the Interstate Commerce Act, the Commission was not authorized to grant the relief requested in Finance Docket No. 23374; and that the relief requested therein was clearly premature.

9. Admits the averments of paragraph 12 thereof except respectfully refers the Court to the petitions and orders referred to therein for the content and conditions thereof.

10. Denies each and every averment of paragraphs 13 and 14 thereof.

Wherefore, Intervenor-Defendant, REA, demands judg-
[fol. 472] ment dismissing the complaint together with expenses and disbursements.

August 16, 1965.

Hodges, Silverstein & Harrington, By Joseph G. Hodges, Attorneys for Intervenor-Defendant, Railway Express Agency, Incorporated, 1360 Denver Club Building, Denver, Colorado 80202, 534-0211.

Of Counsel:

William J. Taylor, Esq., 219 East 42nd Street, New York, N. Y. 10017.

Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, N. Y. 10005.

[fol. 473]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF INTERVENOR-DEFENDANT RAILWAY EXPRESS AGENCY, INCORPORATED TO COMPLAINT OF INTERVENOR-PLAINTIFF FREIGHT FORWARDERS INSTITUTE—Filed August 16, 1965

Intervenor-Defendant, Railway Express Agency, Incorporated (REA), for its answer to the complaint of Intervenor-Plaintiff, Freight Forwarders Institute, herein:

1. Admits the averments of the first sentence of paragraph I thereof and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments thereof except that certain of the members of Intervenor-Plaintiff compete to a limited extent with REA and the Greyhound Corporation in the movement of package freight between certain points in the United States.

2. Admits the averments of paragraph II thereof.

3. With respect to paragraph III thereof, repeats and realleges its answer to paragraphs 3, 4, 5, 6 (in so far as it relates to the proceedings in Finance Docket No. 23324), 8, 9, 10, 12 (in so far as it relates to Finance Docket No. 23324), 13, 15, and 16 (in so far as it relates to Finance [fol. 474] Docket No. 23324) of the original complaint in this action, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the averment, that freight forwarders in the ordinary conduct of their business compete directly with REA and Greyhound, except to the extent set forth in paragraph 1 hereof.

[File endorsement omitted]

4. Denies each and every averment of paragraph IV thereof.

Wherefore, Intervenor-Defendant, REA, demands judgment dismissing the complaint together with expenses and disbursements.

August 16, 1965

Hodges, Silverstein & Harrington, By Joseph G. Hodges, Attorneys for Intervenor-Defendant, Railway Express Agency, Incorporated, 1360 Denver Club Building, Denver, Colorado 80202, 534-0211.

Of Counsel:

William J. Taylor, Esq., 219 East 42nd Street, New York, New York 10017.

Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York 10005.

[fol. 475]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT—
Filed August 25, 1965

Plaintiffs, Denver and Rio Grande Western Railroad Company, et al., move the Court for leave to file a Supplemental Complaint, a copy of which is attached hereto as Exhibit A, on the ground that the transactions, occurrences and events stated therein have happened since the date of plaintiffs' original Complaint and that it is in the interest

[File endorsement omitted]

of justice that all issues between plaintiffs and defendants be litigated in this action.

Lee, Bryans, Kelly & Stansfield, Robert S. Gast, Jr., 550 Fifteenth Street, Denver, Colorado 80202.

Royce D. Sickler, T. A. White, 1531 Stout Street, Denver, Colorado 80217.

R. K. Knowlton, 80 East Jackson Boulevard, Chicago, Illinois 60604.

Harry B. Latourette, C. W. Fiddes, 1517 West Front Street, Tyler, Texas 75702.

Jeremiah C. Waterman, 205 Transportation Building, Washington, D.C. 20006.

By Robert S. Gast, Jr., Attorneys for Plaintiffs.

[fol. 476]

EXHIBIT A TO MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

SUPPLEMENTAL COMPLAINT—Filed October 20, 1965

[fol. 477] To the Honorable Judges for the District Court of the United States for the District of Colorado:

Come Now the plaintiffs above-named by their attorneys and for their Supplemental Complaint filed pursuant to leave granted by Order of this Court on 1965, the plaintiffs above-named respectfully allege and show:

[File endorsement omitted]

1.

Paragraph 1 of the Complaint heretofore filed herein is amended and supplemented so as to read:

"This is a proceeding to enjoin, set aside, annul, and suspend, Orders entered on March 15, 1965, May 28, 1965 and August 11, 1965 by the Interstate Commerce Commission (hereinafter referred to as the "Commission") in administrative proceedings identified as Finance Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* and Finance Docket No. 23374, *Southern Pacific Company* v. *Greyhound Corporation and Railway Express Agency, Incorporated.*"

2.

Paragraph 7 of the Complaint heretofore filed herein is amended and supplemented so as to add, after the word "Commission" in the second line of said paragraph, the following:

"Including the material records of proceedings following the filing of the original Complaint herein,"

3.

Paragraph 13 of the Complaint heretofore filed herein is amended and supplemented so as to add the following sentences at the end thereof:

"Thereafter, on or about June 7, 1965, a petition was filed by Transcontinental Bus System, Inc., et al., requesting the Commission to find that an issue of national transportation importance was involved. Subsequent to the filing of the original complaint herein, [fol. 478] the Commission, by Chairman Webb, on June 16, 1965, issued an Order postponing until further Order of the Commission the effective date of the Order entered on March 15, 1965, as amended by the Corrected Order entered on May 28, 1965. Thereafter, by Order and Corrected Order, both dated August 11,

1965, the Commission acting in General Session (1) recalled the proceedings from Division 3, (2) vacated and set aside the Order of the Appellate Division 3, dated May 28, 1965 and reopened the proceedings for consideration on the present record, (3) on reconsideration affirmed the action taken by Division 3 in its Order dated March 15, 1965, (4) dismissed, as moot, the petition requesting a finding that an issue of general transportation importance is involved, and (5) ordered that the Order of March 15, 1965, as affirmed, be effective 30 days from August 13, 1965. Thereafter, the Commission, by Chairman Webb on August 17, 1965, issued an Order postponing until further Order of the Commission the effective date of the Order of March 15, 1965, as modified by the Corrected Order of August 11, 1965."

Lee, Bryans, Kelly & Stansfield, Robert S. Gast, Jr., 55 Fifteenth Street, Denver, Colorado 80202.

Royce D. Sickler, T. A. White, 1531 Stout Street, Denver, Colorado 80217.

R. K. Knowlton, 80 East Jackson Boulevard, Chicago, Illinois 60604.

Harry B. Latourette, C. W. Fiddes, 1517 West Front Street, Tyler, Texas 75702.

Jeremiah C. Waterman, 205 Transportation Building, Washington, D.C. 20006, Attorneys for Plaintiffs.

[fol. 479]

VERIFICATION

State of California,
City and County of San Francisco, ss.:

I, , state on oath that I am of Southern Pacific Company, one of the plaintiffs in this proceeding, that I have read the foregoing complaint, and that the allegations of fact contained

therein are true to the best of my knowledge, information and belief.

.....

Subscribed and sworn to before me this day of , 1965.

.....

[fol. 480]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—
Filed August 30, 1965

The United States of America, a defendant in the above action, in answer to the complaint and the intervening complaints neither admits nor denies the allegations thereof. The United States of America neither supports nor opposes the order of the Commission.

John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530.

Robert L. Wright, Acting Assistant Attorney General.

Lawrence M. Henry, United States Attorney, Denver, Colorado.

Attorneys for the United States of America.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 481]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—
Filed August 28, 1965

Comes now the Interstate Commerce Commission, defendant, and for answer to the complaint of The Denver and Rio Grande Western Railroad Company, et al., herein says:

I.

Defendant admits the allegations contained in paragraph 1 of the complaint, but avers that the entire Commission, by corrected order dated August 11, 1965, vacated and set aside the order of Appellate Division 3, dated May 28, 1965, and, upon reconsideration affirmed the order of Division 3, dated March 15, 1965.

II.

Defendant admits the allegations contained in paragraphs 2 through 5 of the complaint.

III.

Defendant admits the allegations contained in paragraph 6 of the complaint, but respectfully refers the Court to the [fol. 482] application and complaint therein described for a complete statement of their contents.

IV.

Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the aver-

[File endorsement omitted]

ments contained in paragraph 7 of the complaint since the copies of the complaint served on defendant do not have copies of the materials referred to in said paragraph 7. In further answer to the allegations contained in paragraph 7, defendant avers that there have been further Commission proceedings since the filing of the complaint which necessarily render incomplete the material records alleged to have been filed with the complaint.

V.

Answering the allegations contained in paragraph 8 of the complaint, defendant admits that the Greyhound Corporation (Greyhound) has its principal place of business at Chicago, Illinois, controls Greyhound Lines, Inc., a common carrier by bus engaged in the transportation of passengers and property between points in all states of the United States, except Alaska and Hawaii, and that Greyhound is subject to some of the provisions of the Interstate Commerce Act.

VI.

Answering the allegations contained in paragraph 9 of the complaint, defendant admits that REA and Greyhound Lines, Inc., are, to a limited extent, competitors for the transportation of property within the United States, except Alaska and Hawaii.

[fol. 483]

VII.

Defendant admits the allegations contained in paragraph 10 of the complaint, except respectfully refers the Court to the petitions referred to in said paragraph for a true and complete statement of their contents.

VIII.

Defendant admits the allegations contained in paragraph 11 of the complaint.

IX.

Answering the allegations contained in paragraph 12 of the complaint, defendant denies that the Commission "held no hearings whatever in either proceeding," admits that no oral hearings were held, and admits the remaining allegations contained in paragraph 12.

X.

Defendant admits the allegations contained in paragraph 13 of the complaint, except refers the Court to the petitions and orders referred to therein for a true and complete statement of their contents.

XI.

Defendant denies the allegations contained in paragraph 14 of the complaint.

XII.

Defendant admits the allegations contained in paragraph 15 of the complaint, except avers that the order of May 28, 1965, referred to therein has been vacated and superseded by an order of the entire Commission dated August 11, 1965.

[fol. 484]

XIII.

Defendant denies the allegations contained in paragraphs 16 through 18 of the complaint.

XIV.

For further answer to the allegations of the complaint, defendant denies that the orders of the Commission challenged in this action are unlawful for the reasons specified in the complaint or for any other reason whatsoever; and avers that the orders of the Commission under attack are valid in all respects. Except as expressly admitted herein, each and every allegation of the complaint is denied.

Wherefore, the Interstate Commerce Commission, defendant, having fully answered the complaint, prays that the relief prayed for by the plaintiffs be denied and that their complaint be dismissed.

Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D. C. 20423; Robert W. Ginnane, General Counsel; Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 485]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 9205

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF INTERVENORS RINGSBY TRUCK LINES, INC., ET AL.—Filed August 28, 1965

Comes now the Interstate Commerce Commission, defendant, and for answer to the complaint filed herein by intervenor, Ringsby Truck Lines, Inc., et al., says:

I.

Defendant admits the allegations contained in paragraph 1 of the complaint, but avers that the entire Commission, by corrected order dated August 11, 1965, vacated and set aside the order of Appellate Division 3, dated May 28, 1965, and, upon reconsideration, affirmed the order of Division 3, dated March 15, 1965.

[File endorsement omitted]

II.

Defendant admits the allegations contained in the first sentence of paragraph 2 of the complaint, but neither admits nor denies the allegations contained in the second [fol. 486] sentence thereof for the reason that such allegations are argumentative and require no answer.

III.

Defendant admits the allegations contained in paragraph 3 through 5 of the complaint.

IV.

Defendant admits the allegations contained in paragraph 6 of the complaint, but respectfully refers the Court to the application and complaint therein described for a true and complete statement of their contents.

V.

Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 7 of the complaint since the copies of the original complaint served on defendant do not have copies of the materials referred to in said paragraph 7. In further answer to the allegations contained in paragraph 7, defendant avers that there have been further Commission proceedings since the filing of the complaint which necessarily render incomplete the material records alleged to have been filed with the original complaint.

VI.

Answering the allegations contained in paragraph 8 of the complaint, defendant admits that the Greyhound Corporation (Greyhound) has its principal place of business [fol. 487] at Chicago, Illinois, controls Greyhound Lines, Inc., a common carrier by bus engaged in the transportation of passengers and property between points in all states

of the United States, except Alaska and Hawaii, and that Greyhound is subject to some of the provisions of the Interstate Commerce Act.

VII.

Answering the allegations contained in paragraph 9 of the complaint, defendant admits that REA and Greyhound Lines, Inc., are, to a limited extent, competitors for the transportation of property within the United States, except Alaska and Hawaii.

VIII.

Defendant admits the allegations contained in paragraph 10 of the complaint, except respectfully refers the Court to the petitions referred to in said paragraph for a true and complete statement of their contents.

IX.

Answering the allegations contained in paragraph 11 of the complaint, defendant denies that the Commission "held no hearings whatever in either proceeding," admits that no oral hearings were held, and admits the remaining allegations contained in paragraph 11.

[fol. 488]

X.

Defendant admits the allegations contained in paragraph 12 of the complaint, except respectfully refers the Court to the petitions and orders referred to therein for a true and complete statement of their contents.

XI.

Defendant denies the allegations contained in paragraphs 13 and 14 of the complaint.

XII.

For further answer to the allegations of the intervening complaint, defendant denies that the orders of the Com-

mission challenged in this action are unlawful for the reasons specified in the intervening complaint or for any other reason whatsoever; and avers that the orders of the Commission under attack are valid in all respects. Except as expressly admitted herein, each and every allegation of the intervening complaint is denied.

Wherefore, the Interstate Commerce Commission, defendant, having fully answered the intervening complaint, prays that the relief prayed for by the intervening plaintiffs be denied and that their complaint be dismissed.

[fol. 489] Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D. C. 20423; Robert W. Ginnane, General Counsel; Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 490]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF INTERVENORS AMERICAN TRUCKING ASSOCIATIONS, ET AL.—Filed August 28, 1965

Comes now the Interstate Commerce Commission, defendant, and for answer to the complaint filed herein by intervenors, American Trucking Associations, et al., says:

[File endorsement omitted]

I.

Defendant admits the allegations contained in paragraphs 1 through 3 of the complaint.

II.

Defendant admits the allegations contained in paragraphs 4 through 11 of the complaint, except respectfully refers the Court to the various pleadings and orders referred to in the Commission proceedings for a true and complete statement of their contents.

[fol. 491]

III.

Answering the allegations contained in paragraph 12 of the complaint, defendant admits that intervening plaintiffs have exhausted their administrative remedies, but denies that the order of Division 3, acting as an Appellate Division, served on June 4, 1965, is now administratively final, and avers that said order of Division 3 has been vacated and superseded by an order of the entire Commission, served on August 13, 1965, which is administratively final.

IV.

Defendant denies the allegations contained in paragraph 13 of the complaint.

V.

For further answer to the allegations of the complaint, defendant denies that the orders of the Commission challenged in this action are unlawful for the reasons specified in the complaint or for any other reason whatsoever; and avers that the orders of the Commission under attack are valid in all respects. Except as expressly admitted herein, each and every allegation of the complaint is denied.

Wherefore, the Interstate Commerce Commission, defendant, having fully answered the complaint, prays that the

relief prayed for by the intervening plaintiffs be denied and that their complaint be dismissed.

[fol. 492] Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D. C. 20423; Robert W. Ginnane, General Counsel; Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 493]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF INTERVENOR FREIGHT FORWARDERS INSTITUTE—Filed August 28, 1965

Comes now the Interstate Commerce Commission, defendant, and for answer to the complaint filed herein by intervenor Freight Forwarders Institute, says:

I.

Defendant admits the allegations contained in the first sentence of paragraph I of the complaint, but neither admits nor denies the allegations contained in the second sentence thereof for the reason that such allegations are argumentative and require no answer.

II.

Defendant admits the allegations contained in paragraph II of the complaint.

[File endorsement omitted]

[fol. 494]

III.

Answering the allegations contained in paragraph III of the complaint, wherein intervening plaintiff adopts and incorporates by reference the pertinent statements and allegations contained in paragraphs 3, 4, 5, 6, 8, 9, 10, 12, 13, 15 and 16 of the original complaint filed by plaintiffs, The Denver and Rio Grande Western Railway Company, et al., defendant adopts and incorporates herein by reference its answers given in paragraphs II, III, V, VI, VII, IX, X, XII and XIII of its answer to said original complaint.

IV.

Defendant denies the allegations contained in paragraph IV of the complaint.

V.

For further answer to the allegations of the complaint, defendant denies that the orders of the Commission challenged in this action are unlawful for the reasons specified in the complaint or for any other reason whatsoever; and avers that the orders of the Commission under attack are valid in all respects. Except as expressly admitted herein, each and every allegation of the complaint is denied.

Wherefore, the Interstate Commerce Commission, defendant, having fully answered the complaint of intervenor, [fol. 495] prays that the relief prayed for by the intervening plaintiff be denied and that its complaint be dismissed.

Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D. C. 20423; Robert W. Ginnane, General Counsel; Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 496]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT—Filed September 7, 1965

Intervening plaintiffs, American Trucking Associations, Inc., and Regular Common Carrier Conference, move the Court for leave to file a supplemental complaint, a copy of which is attached hereto as Exhibit A, on the ground that the transactions, occurrences, and events stated therein have happened since the date of intervening plaintiffs' original complaint and that it is in the interest of justice that all issues between plaintiffs and defendants be litigated in this action.

Respectfully submitted,

Peter T. Beardsley, Richard R. Sigmon, Harry J. Jordan, R. Edwin Brady, 1616 P Street, N. W., Washington, D. C. 20036;

Roland Rice, Rice, Carpenter & Carraway, 618 Perpetual Building, Washington 4, D. C.;

Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado, Attorneys for Intervening Plaintiffs.

Of Counsel: Jones, Meiklejohn, Kehl & Lyons, 420 Denver Club Building, Denver, Colorado.

[File endorsement omitted]

[fol. 497]

EXHIBIT A TO MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

SUPPLEMENTAL COMPLAINT—Filed October 20, 1965

To the Honorable Judges for the District Court of the United States for the District of Colorado:

Come now intervening plaintiffs, American Trucking Associations, Inc., and Regular Common Carrier Conference by their attorneys and for their supplemental complaint, filed pursuant to leave granted by order of this Court on 1965, respectfully allege and show:

1.

Paragraph 1 of the complaint heretofore filed is amended and supplemented so as to read:

This is an action to suspend, annul, and set aside three orders entered by the defendant Interstate Commerce Commission and served on March 16, 1965, June 4, 1965, and August 13, 1965, in Finance Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* and arises under the provisions of Sections 17 and 205(g) and (h) of the Interstate Commerce Act, 49 U.S.C. §§ 17, 305(g) and (h), Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, and Sections 1336, 1398, 2284, and 2321 through 2325 of the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284, and 2321 through 2325. The United States

[File endorsement omitted]

of America is named as a defendant pursuant to Section 2322 of the Judicial Code, 28 U.S.C. § 2322.

[fol. 498]

2.

Paragraph 11 of the complaint heretofore filed is amended and supplemented so as to add the following sentences at the end thereof:

Thereafter, on or about June 7, 1965, a petition was filed by Transcontinental Bus System, Inc., et al., requesting the Commission to find that an issue of national transportation importance was involved. Subsequent to the filing of the original complaint herein, the Commission, by Chairman Webb, on June 17, 1965, issued an order postponing until further order of the Commission the effective date of the order served June 4, 1965. Then, by order and corrected order, both served August 13, 1965, the Commission acting in General Session recalled the proceedings from Division 3, vacated and set aside the order of the Appellate Division 3, served June 4, 1965, and reopened the proceedings for reconsideration on the present record. On reconsideration it affirmed the action taken by Division 3 in its order dated March 16, 1965, dismissed as moot the petition requesting a finding that an issue of general transportation importance is involved, and ordered that the order of March 16, 1965, as affirmed, be effective 30 days from August 13, 1965. Subsequently, the Commission, by Chairman Webb on August 18, 1965, served an order postponing until further order of the Commission the effective date of the order of March 16, 1965, as modified by the corrected order of August 13, 1965.

3.

Paragraph 12 of the complaint heretofore filed is amended and supplemented so as to read:

By Section 17 of the Interstate Commerce Act, 49 U.S.C. § 17, the order of the Commission served August 13, 1965, is administratively final, and intervening plaintiffs have exhausted their administrative remedies.

[fol. 499]

4.

Paragraph 13 of the complaint heretofore filed is amended and supplemented so as to read:

By its orders served March 16, 1965, June 4, 1965, and August 13, 1965, in Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* the defendant Interstate Commerce Commission acted unlawfully, arbitrarily, and capriciously, and abused its discretion in the following particulars:

5.

Paragraph c of the prayer of the complaint heretofore filed is amended and supplemented to read:

That upon final hearing, the Court find that the orders of the defendant Interstate Commerce Commission served March 16, 1965, June 4, 1965, and August 13, 1965, in the Commission's Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* are unlawful, null, and void;

Respectfully submitted,

Peter T. Beardsley
Richard R. Sigmon
Harry J. Jordan
R. Edwin Brady
1616 P Street, N. W.
Washington, D. C. 20036

Roland Rice
Rice, Carpenter & Carraway
618 Perpetual Building
Washington 4, D. C.

/s/ Edward T. Lyons, Jr.
420 Denver Club Building
Denver, Colorado

Attorneys for Intervening Plaintiffs

Of Counsel:

Jones, Meiklejohn, Kehl & Lyons
420 Denver Club Building
Denver, Colorado

[fol. 500] Certificate of Service (omitted in printing).

[fol. 501]

In the United States District Court

For the District of Colorado

Civil Action No. 9205

[Title omitted]

Motion for Leave to File Supplemental Complaint—
Filed September 17, 1965

Intervening Plaintiff, Freight Forwarders Institute, moves the Court to file a supplemental complaint, a copy of which is attached hereto as Exhibit A, on the grounds and for the reasons indicated in the "Amended Motion for Leave to File Supplemental Complaint" of the Plaintiffs-in-chief.

Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado 80202.

Harry C. Ames, 529 Transportation Building, Washington, D. C., 20006.

Giles Morrow, 1012 Fourteenth Street, N. W., Washington, D. C., 20005.

Of Counsel:

Jones, Meiklejohn, Kehl & Lyons, 420 Denver Club Building, Denver, Colorado, 80202.

[File endorsement omitted]

[fol. 502] EXHIBIT "A" TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 9205

[Title omitted]

SUPPLEMENTAL COMPLAINT—Filed October 20, 1965

Comes Now the Intervening Plaintiff, Freight Forwarders Institute, by its attorneys, and for its Supplemental Complaint filed pursuant to leave granted by Order of the Court on , 1965, respectfully alleges and shows:

Paragraphs 1, 13, 15 and 16 of the Complaint-in-chief heretofore filed, and in which this Intervening Plaintiff joined in its intervening complaint, are amended to the extent, and in the manner sought by Plaintiffs-in-chief.

Respectfully submitted,

/s/ EDWARD T. LYONS, JR.
420 Denver Club Building
Denver, Colorado 80202

HARRY C. AMES
529 Transportation Building
Washington, D. C. 20006

GILES MORROW
1012 Fourteenth Street, N. W.
Washington, D. C. 20005

Of Counsel:

JONES, MEIKLEJOHN, KEHL & LYONS
420 Denver Club Building
Denver, Colorado 80202

[File endorsement omitted]

[fol. 503] Certificate of Service (omitted in printing).

[fol. 504]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT IN INTERVENTION—Filed September 13, 1965

Intervening Plaintiffs, Ringsby Truck Lines, Inc.; Navajo Freight Lines, Inc.; Denver Chicago Trucking Company, Inc.; Illinois-California Express, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Western Gillette, Inc.; IML Freight, Inc.; and Consolidated Copperstate Lines, move the Court for leave to file a Supplemental Complaint, a copy of which is attached hereto as Exhibit "A", on the ground that certain transactions, occurrences and events stated therein have happened since the filing of Intervening Plaintiffs' original Complaint in Intervention which directly relate to the subject matter thereof and that it is in the interest of expedition and justice that all related issues between Defendants and these Intervening Plaintiffs be litigated in this action.

David Axelrod, 39 South LaSalle Street, Chicago, Illinois, 60603.

Eugene T. Liipfert, Berl I. Bernhard, 1035 Universal Building North, Washington, D. C., 20009, Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado, 80202, Attorneys for Intervening Plaintiffs.

Of Counsel:

Axelrod, Goodman & Steiner, 39 South La Salle Street, Chicago, Illinois, 60603.

[File endorsement omitted]

Verner, Liipfert & Bernhard, 1035 Universal Building North, Washington, D. C., 20009.

Jones, Meiklejohn, Kehl & Lyons, 420 Denver Club Building, Denver, Colorado, 80202.

[fol. 505]

EXHIBIT "A" TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 9205

[Title omitted]

SUPPLEMENTAL COMPLAINT—Filed October 20, 1965

To the Honorable Judges for the District Court
Of the United States for the District of Colorado:

Come Now the Intervening Plaintiffs, Ringsby Truck Lines, Inc.; Navajo Freight Lines, Inc.; Denver Chicago Trucking Company, Inc.; Illinois-California Express, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Western Gillette, Inc.; IML Freight, Inc.; and Consolidated Copperstate Lines, by their attorneys and for their Supplemental Complaint filed pursuant to leave granted by Order of this Court on , 1965, the Intervening Plaintiffs above named respectfully allege and show:

1.

Paragraph 1 of the Complaint in Intervention heretofore filed herein is amended and supplemented so as to read:

"This is a proceeding to enjoin, set aside, annul, and suspend, Orders entered on March 15, 1965, May 28, 1965, and August 11, 1965 by the Interstate Commerce

[File endorsement omitted]

Commission (hereinafter referred to as the "Commission") in administrative proceedings identified as Finance Docket No. 23324, *Railway Express, Incorporated, Stock,* and Finance Docket No. 23374, *Southern Pacific Company* v. *Greyhound Corporation and Railway Express, Incorporated,* brought by The Denver and Rio Grande Western Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; and Southern Pacific Company."

2.

Paragraph 7 of the Complaint in Intervention heretofore filed herein is amended and supplemented so as to read:

[fol. 506] "Copies the material records in the proceedings in Finance Docket 23324, duly certified to by the Secretary of the Commission according to law (Title 49, U.S.C. § 16(3)), have been or will be filed with the Court, which records are made a part of this Complaint in Intervention by reference, and are hereinafter referred to collectively as the "record" and respectively by the names of the documents comprising such records."

3.

Paragraph 12 of the Complaint in Intervention heretofore filed herein is amended and supplemented so as to add the following sentences at the end thereof:

"Thereafter, on or about June 7, 1965, a petition was filed by Transcontinental Bus System, Inc., et al., requesting the Commission to find that an issue of national transportation importance was involved. The Commission, by Chairman Webb, on June 16, 1965, issued an Order postponing the effective date of the Order entered on March 15, 1965, as amended by the

Corrected Order entered on May 28, 1965. Thereafter by Order and Corrected Order, both dated August 11, 1965, the Commission acting in general session (1) recalled the proceeding from Division 3, (2) vacated and set aside the Order of the Appellate Division 3, dated May 28, 1965, and reopened the proceedings for consideration on the present record, (3) on reconsideration affirmed the action taken by Division 3 in its Order dated March 15, 1965, (4) dismissed, as moot, the petition requesting a finding that an issue of general transportation importance is involved, and (5) ordered that the Order of March 15, 1965, as affirmed, be effective 30 days from August 13, 1965. Thereafter, the Commission, by Chairman Webb, on August 17, 1965, issued an Order postponing until further order of the Commission the effective date of the Order of March 15, 1965 as modified by the Corrected Order of August 11, 1965."

4.

Paragraph 13 of the Complaint in Intervention heretofore filed herein is amended and supplemented by changing the introductory clause thereof so as to read:

"The Commission in making and issuing said Orders of March 15, 1965, May 28, 1965 and August 11, 1965 erred as a matter of law and in abuse of its discretion in the following particulars:"

5.

Paragraph 14 of the Complaint in Intervention heretofore filed herein is amended and supplemented so as to read:

"If the Orders of March 15, 1965, May 28, 1965, and August 11, 1965 are enforced, said Orders will cause Plaintiffs to suffer immediate and irreparable damage, in that:

(a) Once the transaction is approved and consummated, it would be extremely difficult, if not impos-

sible, to secure the divestment of control by GREYHOUND and to restore the status quo at a later date [fol. 507] and, in any event, Plaintiffs would be compelled to incur substantial expense in lengthy and complicated legal proceedings to that end.

(b) If said Orders of March 15, 1965, May 28, 1965, and August 11, 1965 are permitted to become effective and GREYHOUND is permitted to acquire a twenty percent stock interest in REA, competition for transportation of express traffic would be substantially lessened and a tendency toward monopoly of such transportation set in motion which would handicap and in time foreclose the competition of these Plaintiffs for transportation of express and other traffic."

David Axelrod
39 South LaSalle Street
Chicago, Illinois 60603

Eugene T. Liipfert
Berl I. Bernhard
1035 Universal Building North
Washington, D. C. 20009

/s/ EDWARD T. LYONS, JR.
Edward T. Lyons, Jr.
420 Denver Club Building
Denver, Colorado 80202

Attorneys for Intervening Plaintiffs

Of Counsel:

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39 South LaSalle Street
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Jones, Meiklejohn, Kehl & Lyons
420 Denver Club Building
Denver, Colorado 80202

[fol. 508] Certificate of Service (omitted in printing).

[fol. 509]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ORDER CONCERNING SUPPLEMENTAL COMPLAINTS, ANSWERS THERETO, AND BRIEFING SCHEDULE—Entered and Filed October 20, 1965

This Matter coming on to be heard this day upon the written stipulations of the parties with respect to filing supplemental complaints and answers thereto and the filing of briefs, and the Court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered:

1. The motion of plaintiffs for leave to file amended supplemental complaint is granted, the amended supplemental complaint of plaintiffs shall be deemed served and filed herein as of the date of this order, the motions of intervening plaintiffs to file supplemental complaints are each granted, and the supplemental complaints of intervening plaintiffs shall be deemed filed and served herein as of the date of this order.

2. Unless separate answers to any such supplemental complaint are served by October 15, 1965, the answers heretofore filed by defendants and intervenor defendants [fol. 510] to the original complaint intended to be supplemented by such supplemental complaint shall be deemed to refer and respond to such complaint as supplemented by such supplemental complaint.

3. The Briefs of plaintiffs and the briefs of intervening plaintiffs shall be filed and served by November 15, 1965.

[File endorsement omitted]

4. Briefs of defendants and of intervenor defendants shall be filed and served by December 15, 1965.

5. Reply briefs of plaintiffs and intervening plaintiffs, if any, shall be filed and served by January 4, 1966.

By the Court:

Jean S. Breitenstein, United States Circuit Judge.

Alfred A. Arraj, United States District Court Judge.

Hatfield Chilson, United States District Court Judge.

It Is Hereby Stipulated by and between the parties hereto, by their respective counsel, that:

1. The foregoing order is agreed to and may be entered.

2. The parties request that the Court set this case for oral argument upon the merits as soon as practicable after the January 10, 1966, session of the Court of Appeals of the [fol. 511] Tenth Circuit and on a day certain so that out-of-town counsel may plan accordingly.

Lee, Bryans, Kelly & Stansfield, Robert S. Gast, Jr., 550 Fifteenth Street, Denver, Colorado, 80202.

Royce D. Sickler, T. A. White, 1531 Stout Street, Denver, Colorado, 80217.

R. K. Knowlton, 80 East Jackson Boulevard, Chicago, Illinois, 60604.

Harry B. LaTourette, C. W. Fiddes, 1517 West Front Street, Tyler, Texas, 75702.

Jeremiah C. Waterman, 205 Transportation Building, Washington, D. C., 20006, By Robert S. Gast, Jr., Attorneys for Plaintiffs, The Denver and Rio Grande Western Railroad Company, et al.

Jones, Meiklejohn, Kehl & Lyons, Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado, 80202.

Peter T. Beardsley, Richard R. Sigmon, Harry J. Jordan, R. Edwin Brady, 1616 P Street, N. W., Washington, D. C., 20036, By Edward T. Lyons, Jr., Attorneys for Intervening Plaintiffs, American Trucking Associations, Inc., et al.

[fol. 512]

Jones, Meiklejohn, Kehl & Lyons, Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado, 80202.

Harry C. Ames, 527 Transportation Building, Washington, D. C., 20006.

Giles Morrow, 1012 Fourteenth St., N. W., Washington, D. C., 20005, By Edward T. Lyons, Jr., Attorneys for Intervening Plaintiff, Freight Forwarders Institute.

Jones, Meiklejohn, Kehl & Lyons, Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado, 80202.

Axelrod, Goodman & Steiner, David Axelrod, 39 South La Salle Street, Chicago, Illinois, 60603.

Verner, Liipfert and Bernard, Eugene T. Liipfert, Berl I. Bernhard, 1035 Universal Building North, Washington, D. C., 20009, By Edward T. Lyons, Jr., Attorneys for Intervening Plaintiffs, Ringsby Truck Lines, Inc., et al.

Lawrence M. Henry, United States Attorney, Denver, Colorado.

Robert L. Wright, Acting Assistant Attorney General.

John H. D. Wigger, Attorney, Department of Justice, Washington, D. C., 20530, By Robert E. Long, Attorneys for Defendant, The United States of America.

[fol. 513]

Robert W. Ginnane, General Counsel.

Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D. C., 20423, By Robert E. Long, Attorneys for Defendant, The Interstate Commerce Commission.

Hodges, Silverstein & Harrington, Joseph G. Hodges, 1360 Denver Club Building, Denver, Colorado, 80202.

William J. Taylor, 219 East 42nd Street, New York, New York, 10017.

Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York, 10005, By Joseph G. Hodges, Attorneys for Intervenor-Defendant, Railway Express Agency, Incorporated.

Dawson, Nagel, Sherman & Howard, 1900 First National Bank Building, Denver, Colorado, 80202.

McCutchen, Doyle, Brown, Trautman & Enersen, 601 California Street, San Francisco, California, 94108, By Winston S. Howard, Attorneys for Intervenor-Defendant, The Greyhound Corporation.

[fol. 514]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

ORDER AUTHORIZING INTERVENTION—Entered and Filed November 10, 1965

This Matter having come before the Court on the "Motion of Transcontinental Bus System, Inc., et al. for Leave to Intervene as Plaintiffs"; and it appearing that the Plaintiffs and Defendants stipulate that said Motion may be granted; and it further appearing that Title 28 of the United States Code, Section 2323, grants said Movants an unconditional right to intervene in this proceeding as parties Plaintiff; and this Court being fully advised in the premises, it is therefore

Ordered, Adjudged and Decreed that the "Motion of Transcontinental Bus System, Inc., et al. for Leave to Intervene as Plaintiffs" be, and it is hereby, granted; and

Further Ordered that said Transcontinental Bus System, Inc., et al. be, and they are hereby, made parties Plaintiff in this action, and that said Intervening Plaintiffs be, and they are hereby, authorized forthwith to participate in all respects as Plaintiffs in this suit and the Order of October 20, 1965, covering briefing schedule shall apply also to said intervening plaintiffs; and

Further Ordered that the tendered Complaint of said Intervening Plaintiffs be and it is hereby ordered to be filed in this action and unless separate answers to such Complaint of said Intervening Plaintiffs is filed by 36 days from and after service of said Complaint on them,

[File endorsement omitted]

the answers to the original Complaints heretofore filed by the defendants and intervening defendants shall be deemed to refer to and respond to the Complaint of the intervening plaintiffs.

Dated at Denver, Colorado this 10th day of November, 1965.

By the Court:

Jean S. Breitenstein, United States Circuit Judge;

Alfred A. Arraj, United States Circuit Judge;

Hatfield Chilson, United States Circuit Judge.

[fol. 515] Approved as to Form:

Lee, Bryans, Kelly & Stansfield, Robert S. Gast, Jr., 550 Fifteenth Street, Denver, Colorado, 80202;

Royce D. Sickler, T. A. White, 1531 Stout Street, Denver, Colorado, 80217;

R. K. Knowlton, 80 East Jackson Boulevard, Chicago, Illinois, 60604;

Harry B. LaTourette, C. W. Fiddes, 1517 West Front Street, Tyler, Texas, 75702;

Jeremiah C. Waterman, 205 Transportation Building, Washington, D.C. 20006;

By Robert S. Gast, Jr.;

Attorneys for Plaintiffs, The Denver and Rio Grande Western Railroad Company, et al.

Jones, Meiklejohn, Kehl & Lyons, Edward T. Lyons, Jr., 420 Denver Club Building, Denver, Colorado, 80202;

Peter T. Beardsley, Richard R. Sigmon, Harry J. Jordan, R. Edwin Brady, 1616 P Street, N.W., Washington, D.C., 20036;

By Edward T. Lyons, Jr.;

Attorneys for Intervening Plaintiffs, American Trucking Association, Inc., et al.

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Axelrod, Goodman & Steiner, David Axelrod, 39 South La Salle Street, Chicago, Illinois, 60603;

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By Edward T. Lyons, Jr.;

Attorneys for Intervening Plaintiffs, Ringsby Truck Lines, Inc., et al.

Lawrence M. Henry, United States Attorney, Denver, Colorado;

Robert L. Wright, Acting Assistant Attorney General;

John H. D. Wigger, Attorney, Department of Justice, Washington, D.C., 20530;

By Robert E. Long;

Attorneys for Defendant, The United States of America.

Robert W. Ginnane, General Counsel;

Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D.C., 20423;

By Robert E. Long;

Attorneys for Defendant, The Interstate Commerce Commission.

[fol. 516] Hodges, Silverstein & Harrington, Joseph G. Hodges, 1360 Denver Club Building, Denver, Colorado, 80202;

William J. Taylor, 219 East 42nd Street, New York, New York, 10017;

Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York, 10005;

By Joseph G. Hodges;

Attorneys for Intervenor-Defendant, Railway Express Agency, Incorporated.

Dawson, Nagel, Sherman & Howard, 1900 First National Bank Building, Denver, Colorado, 80202;

McCutchen, Doyle, Brown, Trautman & Enersen, 601 California Street, San Francisco, California, 94108;

By Winston S. Howard;

Attorneys for Intervenor-Defendant, The Greyhound Corporation.

[fol. 517]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 9205

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS; and SOUTHERN PACIFIC COMPANY, Plaintiffs,

and

RINGSBY TRUCK LINES, INC.; NAVAJO FREIGHT LINES, INC.; DENVER CHICAGO TRUCKING COMPANY, INC.; ILLINOIS-CALIFORNIA EXPRESS, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; TRANSCON LINES; WATSON-WILSON TRANSPORTATION SYSTEM, INC.; WESTERN GILLETTE, INC.; CONSOLIDATED COPPERSTATE LINES; AMERICAN TRUCKING ASSOCIATIONS, INC.; REGULAR COMMON CARRIER CONFERENCE; FREIGHT FORWARDERS INSTITUTE; TRANSCONTINENTAL BUS SYSTEM, INC.; AMERICAN BUSLINES, INC.; ARKANSAS MOTOR COACHES LTD., INC.; BAYSHORE BUS LINES, INC.; CONTINENTAL BUS SYSTEM, INC.; CONTINENTAL CRESCENT LINES, INC.; CONTINENTAL PANHANDLE LINES, INC.; CONTINENTAL SOUTHERN LINES, INC.; CONTINENTAL TENNESSEE LINES, INC.; DENVER-COLORADO [fol. 518] SPRINGS-PUEBLO MOTORWAY; DENVER-SALT LAKE-PACIFIC STAGES, INC.; CONTINENTAL PACIFIC LINES, INC.; MIDWEST BUSLINES, INC.; SMOKY MOUNTAIN STAGES, INC.; TENNESSEE TRAILWAYS, INC.; UNION BUS LINES, INC.; and MUSCATINE, DAVENPORT AND CLINTON BUS COMPANY, Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

RAILWAY EXPRESS AGENCY, INCORPORATED, and THE GREYHOUND CORPORATION, Intervening Defendants.

Lee, Bryans, Kelly & Stansfield, Robert S. Gast, Jr., Royce D. Sickler, and T. A. White, Denver, Colorado; R. K. Knowlton, Chicago, Illinois; Harry B. LaTourette and C. W. Fiddes, Tyler, Texas; and Jeremiah C. Waterman, Washington, D.C., for Plaintiffs.

David Axelrod, Chicago, Illinois; Eugene T. Liipfert and Ronald B. Natalie, Washington, D. C.; and Edward T. Lyons, Jr., Denver, Colorado, for Intervening Plaintiffs Ringsby Truck Lines, Inc., Navajo Freight Lines, Inc., Denver Chicago Trucking Company, Inc., Illinois-California [fol. 519] Express, Inc., Pacific Intermountain Express Co., Transcon Lines, Watson-Wilson Transportation System, Inc., Western Gillette, Inc., and Consolidated Copperstate Lines.

Peter T. Beardsley, Harry J. Jordan, R. Edwin Brady, Roland Rice, and Rice, Carpenter & Carraway, Washington, D.C., for Intervening Plaintiffs American Trucking Associations, Inc., and Regular Common Carrier Conference.

William H. Dempsey, Jr., Martin J. Flynn, Harry C. Ames, and Giles Morrow, Washington, D. C.; and Edward T. Lyons, Jr., Denver, Colorado, for Intervening Plaintiff Freight Forwarders Institute.

Warren A. Goff, Dallas, Texas; and John R. Barry, Denver, Colorado, for Intervening Plaintiffs Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches Ltd., Inc., Bayshore Bus Lines, Inc., Continental Bus System, Inc., Continental Crescent Lines,

[File endorsement omitted]

Inc., Continental Panhandle Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Inc., Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Bus Lines, Inc., and Muscatine, Davenport and Clinton Bus Company.

Robert L. Wright, Acting Assistant Attorney General, and John H. D. Wigger, Attorney, Department of Justice, Washington, D. C.; and Lawrence M. Henry, United States Attorney, Denver, Colorado, filed an answer for the Defendant United States of America neither supporting nor opposing the action of the Interstate Commerce Commission.

[fol. 520] Robert W. Ginnane, General Counsel, and Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D. C., for Defendant Interstate Commerce Commission.

Hodges, Silverstein & Harrington, Denver, Colorado; Cravath, Swaine & Moore and William J. Taylor, New York, N. Y., for Intervening Defendant Railway Express Agency, Incorporated.

Winston S. Howard and Dawson, Nagel, Sherman & Howard, Denver, Colorado; William W. Schwarzer, Stephen R. Grant, and McCutchen, Doyle, Brown, Trautman & Enersen, San Francisco, California, for Intervening Defendant The Greyhound Corporation.

Before Breitenstein, Circuit Judge, and Arraj and Chilson, District Judges.

OPINION—April 11, 1966

BREITENSTEIN, Circuit Judge.

This suit concerns the validity of an order of the Interstate Commerce Commission authorizing the issuance of stock by Railway Express Agency, Incorporated (REA),

for sale to The Greyhound Corporation.[1] Various carriers [fol. 521] and associations protested the Commission action. The plaintiffs are five railroads, all of which are stockholders of REA. Twenty-nine motor carriers, or associations of motor carriers, have intervened as plaintiffs. REA and Greyhound have intervened on the side of the defendants. We have jurisdiction under 28 U.S.C. § 1336. A three-judge district court is required by 28 U.S.C. § 2325.

REA, Greyhound, and the plaintiff railroads are all subject to the Interstate Commerce Act (the Act). REA is a common carrier by express on railroads and a common carrier by motor vehicle. It competes with Greyhound in the transportation of property between points in all states of the United States, except Alaska and Hawaii.

[fol. 522] REA filed an application under §§ 20a and 214 of the Act[2] for authority to issue 500,000 shares of its common stock to Greyhound at $20 per share upon certain terms and conditions. Various protests, none of which challenged the facts stated by the applicant, alleged that Greyhound was trying to get control of REA in violation of § 5 of the Act,[3] that the issuance of the stock would not conform to the standards of § 20a, and that an evidentiary hearing should be held. The United States Department of Justice intervened asserting that the Commission should act under § 11 of the Clayton Act[4] to determine if the proposed transaction violated § 7 of that Act.[5] Southern Pacific Company, one of the protestants and a plaintiff herein, filed with the Commission a complaint against Greyhound

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[1] The orders were entered in Finance Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* and in Finance Docket No. 23374, *Southern Pacific Co.* v. *Greyhound Corp. and Railway Express Agency, Inc.*

[2] 49 U.S.C. §§ 20a and 314.

[3] 49 U.S.C. § 5.

[4] 15 U.S.C. § 21.

[5] 15 U.S.C. § 18.

[fol. 523] and REA asserting that the transaction encompassed control or management of REA by Greyhound and requesting action by the Commission under § 5(7) of the Act to forbid the consummation of the proposal.

The Commission held no evidentiary hearing. Its March 15, 1965, order recited the background of the transaction, the corporate situation of REA, and the procedures which had been followed. It said that the filing of a § 5 application is "permissive and may not be required;" that an investigation of possible violations of § 5 of the Act and § 7 of the Clayton Act "would not be appropriate at this time;" and that a hearing was not necessary "for a determination of the application for authority to issue said stock under the provisions of sections 20a and 214." The Commission specifically found that the REA stock issue was lawful, compatible with the public interest, reasonably necessary, and consistent with its intended purpose. The [fol. 524] complaint of the Southern Pacific under § 5(7) was dismissed and the stock issue was authorized. This action was then brought to set aside and vacate the order. The Commission has stayed the order until the completion of judicial review.

From 1929 to 1961 REA was operated on a non-profit basis and either leased facilities or used facilities owned by other carriers. In 1961 it changed to a profit-and-loss basis and embarked on a program of capital expenditures to acquire and modernize terminals and equipment. The financing of such program was difficult because of a short history of profitable operations and an unfavorable ratio of debt to equity. Before 1963 only railroads could be stockholders of REA. Although this requirement was then removed, the charter provision that all sales of outstanding shares are subject to a right of first refusal by the railroad shareholders was retained.

In February, 1964, Greyhound submitted a proposal to REA which in essence covered acquisition of control of [fol. 525] REA by Greyhound subject to Commission approval. The offer was not accepted. Thereafter meetings

of executives of the two companies produced a "Memorandum of Understanding" which outlined "potential savings or advantageous arrangements" which would result from the merger of the companies or the consolidation of certain activities. These included joint use of terminals, garages, communication facilities, and sales solicitation.

In July, 1964, Greyhound made a second offer which, with some modifications, was approved by the REA Board of Directors and stockholders.[6] The terms of the agreement appear in the resolution adopted by the REA Board. The important provisions are:

> (1) Greyhound will acquire a 20% stock interest in REA through purchase, at $20 a share, of 500,000 [fol. 526] shares of authorized but unissued stock not subject to the right of first refusal;
>
> (2) Greyhound will have a 20% representation on the REA Board;[7]
>
> (3) If the transaction is approved by the Commission and consummated, Greyhound, for a period of 60 days, will stand ready to purchase, at $20 a share, up to 1,000,000 shares of the outstanding REA stock, subject to the right of first refusal;
>
> (4) The REA Board will seriously consider the sale of REA stock to the airlines and the public; and
>
> (5) "The REA Board shall adopt a resolution declaring the intention to consider seriously and work [fol. 527] toward a long-term agreement between REA and The Greyhound Corporation to consolidate oper-

[6] The stockholders approved by a vote of 1,654,572 shares for and 269,800 shares against. The plaintiffs herein own 211,762 shares.

[7] This is to be accomplished by amending the by-laws to increase the board membership from 23 to 25. The numbers of directors nominated by the various railroad districts remain constant but the at-large directors will be increased from 5 to 7.

ating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage."

The main thrust of the plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing. Consideration of this issue requires an analysis of the statutes upon which reliance is placed.

The REA application was filed under §§ 20a and 214.[8] Section 20a(2) declares that a carrier shall not issue stock without Commission authorization. Section 20a(6) says: "The commission may hold hearings, if it sees fit, to enable [fol. 528] it to determine its decision upon the application for authority." Accordingly, on a § 20a(2) application the Commission has the discretion to determine whether a hearing shall be held.

Section 5(2)(a)(i) covers, among other things, acquisitions of control of one carrier by another through stock ownership and makes such acquisition lawful if approved by the Commission. Section 5(2)(b) requires a carrier seeking authority for such a transaction to present an application to the Commission. Section 5(4) makes it unlawful for a person to enter into a transaction within the scope of § 5(2)(a) without compliance therewith. Section 5(7) authorizes but does not require the Commission on complaint or on its own initiative, but after notice and hearing, to investigate and determine whether any person is violating § 5(4). Here again the holding of a hearing is discretionary with the Commission.

[fol. 529] Section 7 of the Clayton Act[9] prohibits a corporation engaged in commerce from directly or indirectly acquiring in whole or part the stock of another corporation engaged in commerce "where in any line of commerce in any section of the country, the effect of such acquisition

[8] Section 214 makes § 20a applicable to motor carriers.

[9] 15 U.S.C. § 18.

may be substantially to lessen competition, or to tend to create a monopoly." Section 11 of the same act[10] imposes on the Commission the duty of enforcing compliance with § 7 where, as here, the parties concerned are common carriers subject to the Interstate Commerce Act. Section 5(11) of the latter act says that the authority conferred thereunder shall be exclusive and plenary and that any carriers participating in transactions authorized or approved under the section "are relieved from the operation of the antitrust laws."

[fol. 530] The argument is that approval of the stock issuance may not be given without determination, after hearing, of the question of control arising under § 5 of the Act and of the question of the competitive consequences arising under § 7 of the Clayton Act. Although these are somewhat related we shall consider them separately.

The § 5 question is raised in two ways, by the protests filed to the § 20a application and by the complaint of Southern Pacific under § 5(7). These pleadings do not controvert any facts put of record by REA and do not allege any additional factual matters. The pleaded conclusions add nothing. The briefs suggest that cross-examination of the REA and Greyhound officials who participated in the intercompany negotiations may reveal that the true plan contemplates control of REA by Greyhound but no solid basis is shown for the suggestion.

Control is "an issue of fact to be determined by the special circumstances of each case."[11] The difficulty here is [fol. 531] that important and decisive facts are presently unknown. The transaction contemplates the issuance to Greyhound of 500,000 shares out of a total authorization of 2,576,000 shares. The offer of Greyhound to purchase an additional 1,000,000 shares from the present shareholders is subject to such shareholders' right of first re-

[10] 15 U.S.C. § 21.

[11] Rochester Telephone Corp. v. United States, 307 U.S. 125, 145.

fusal. This means that when Greyhound proposes the purchase of any such stock, or a block thereof, all shareholders, including the plaintiffs, may acquire that stock themselves. In its order the Commission noted that Greyhound had been told by railroad representatives, including representatives of the plaintiff railroads, "that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders." If Greyhound acquired the 1,000,000 shares it would own over 50% of the REA stock. If the dissident railroads acquired the same amount the [fol. 532] shoe would be on the other foot as they would then own nearly 50%.

REA has no executive committee and is governed by a 23-man board of directors. Of these 7, 6, and 5 are respectively nominated by the eastern, western, and southern railroad districts and 5 are chosen at large. The transaction contemplates an increase in the board to 25 members with 5 of the at-large members nominated by Greyhound. Any further change in the board requires the two-thirds vote necessary to amend the by-laws. Even if Greyhound acquires a total of 1,500,000 shares the possibility of a change in the make-up of the board would require the cooperation of other shareholders.

The plaintiffs emphasize that portion of the agreement requiring the REA Board "to consider seriously and work toward" an arrangement for consolidation and cooperation "in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage." This commits REA only to se- [fol. 533] rious consideration. The effect will depend on the outcome of the offer to purchase the 1,000,000 shares and the subsequent actions of the REA Board.

The briefs of the parties devote much space to the Breswick litigation.[12] There the district court first set aside

[12] Breswick & Co. v. United States, S.D.N.Y., 138 F.Supp. 123, reversed Alleghany Corp. v. Breswick & Co., 353 U.S. 151, deci-

Commission approval of a stock issue on jurisdictional grounds. The Supreme Court reversed noting that the matter of a hearing was governed by § 20a(6).[13] The case was remanded for consideration of whether the stock issue violated the Interstate Commerce Act.[14] The district court after commenting that under § 20a the Commission was not required as a matter of law to hold an evidentiary hearing [fol. 534] went on to say that the Commission could not approve the issuance of stock without determining the control question which had been raised.[15] The Supreme Court again reversed saying in a short per curiam that the only question open on the remand was whether the transaction violated the Act.[16] Our reading of the decisions convinces us that the Supreme Court has left open the question of whether, when a control question is raised, it must be decided in advance of a § 20a approval of the issuance of stock. In our view a categorical answer cannot be given. In some instances consideration of the public interest may require such determination and in other instances it may not. Generally, the question of control must be answered on a case by case basis. Here we have a situation where the Commission has found that the answer cannot be reached on the basis of the presently known facts. Devel- [fol. 535] opments subsequent to the stock issuance must be awaited.

The intervening plaintiffs argue that the Commission breached its statutory duty in refusing to institute a proceeding to determine whether the transaction violated § 7

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sion on remand Breswick & Co. v. United States, S.D.N.Y., 156 F.Supp. 227, reversed Alleghany Corp. v. Breswick & Co., 355 U.S. 415, decision on remand Breswick & Co. v. United States, S.D.N.Y., 160 F.Supp. 754.

[13] 353 U.S. 151, 175.

[14] Ibid.

[15] 156 F.Supp. 227, 230.

[16] 355 U.S. 416.

of the Clayton Act. This point was raised before the Commission by the Department of Justice which has not pursued the matter before us. In the interval between Commission action and court hearing the Supreme Court decided Seaboard Air Line R.R. v. United States, 382 U.S. 154. In that case two railroads filed with the Commission an application for authority to merge. The Commission approved subject to certain conditions. The district court reversed, concluding that the Commission's analysis of the competitive effects of the merger was fatally defective because the Commission had not determined whether the merger violated § 7 of the Clayton Act. The Supreme Court reversed the district court, holding on the authority of [fol. 536] McLean Trucking Co. v. United States, 321 U.S. 67, 80, 85-87, and Minneapolis & St. Louis Ry. v. United States, 361 U.S. 173, 186, that the Commission may approve a merger notwithstanding a potential violation of the antitrust laws if it makes adequate findings, after weighing the effects of the curtailment of competition against the advantages of improved service, that the merger would be consistent with the public interest under § 5(2)(b). We see no reason why the principles announced in Seaboard as applicable to a § 5 merger proceeding do not apply to a § 20a stock issuance proceeding. We believe that the Commission has followed those principles. It has not shut its eyes to the competitive effects. All it has done is to say that in the circumstances presented the public interest requires the issuance of the stock and that determination of the competitive effects will be appropriate for consideration after the chain of events started by the stock issuance [fol. 537] is ascertainable rather than conjectural.

Whether the approach is under § 5 of the Interstate Commerce Act or § 7 of the Clayton Act the outcome is the same. The Commission has the responsibility of giving effect to the national transportation policy. In the performance of that responsibility the Commission has decided that the REA-Greyhound transaction meets the standards fixed by § 20a(2) and that determination of the

control and competition questions must await developments subsequent to the issuance of the 500,000 shares of REA stock to Greyhound. We are convinced that the Commission took the proper course. In Denver Union Stock Yard Co. v. Producers Livestock Marketing Assoc., 356 U.S. 282, 287, the Supreme Court repeated the observation first made in United States v. Storer Broadcasting Co., 351 U.S. 192, 205, that Congress did not intend an agency "to waste time on applications that do not state a valid basis for a hearing." The principle applies here. Until the facts are de-
[fol. 538] veloped by occurrences after the stock issuance, hearings on control and competitive effects are no more than an exercise in futility. In the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its discretionary powers.[17] The Commission did not decide, and we do not decide, any questions relating to control or competition. They are for the future.

Finally, the intervening plaintiffs argue that the order must fall because the Commission has not made the requisite findings and has not stated the basis of its decision.[18] We do not agree. The facts are not disputed. The Commission decided that it was not appropriate to resolve
[fol. 539] control and competition questions at this time and that the § 20a(2) standards for approval of stock issuance had been met. In our opinion the Commission order is clear and understandable and presents an adequate basis for judicial review.

The clerk shall forthwith enter judgment for the defendants dismissing the action.

Done at Denver, Colorado, this 11th day of April, 1966.

Jean S. Breitenstein, United States Circuit Judge.
Alfred A. Arraj, United States District Judge.
Hatfield Chilson, United States District Judge.

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[17] See United States v. Pierce Auto Freight Lines, 327 U.S. 515, 536.

[18] See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-169; Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 93-95, 332 U.S. 194, 196-197.

[fol. 540]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, et al., Plaintiffs,

and

RINGSBY TRUCK LINES, INC. et al., Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

RAILWAY EXPRESS AGENCY, INCORPORATED, and THE GREYHOUND CORPORATION, Intervening Defendants.

JUDGMENT OF DISMISSAL—Entered and Filed April 11, 1966

Pursuant to the Memorandum Opinion filed in the above-entitled action directing the Clerk to forthwith enter a judgment dismissing the action, it is, therefore

Ordered that the action and plaintiffs' complaint, and the complaints of the intervening plaintiffs be, and the same are hereby, dismissed.

Dated at Denver, Colorado, this 11th day of April, 1966.

By Order of the Court: G. Walter Bowman, Clerk.

[File endorsement omitted]

[fol. 541]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 3, 1966

I.

Notice is hereby given that The Denver and Rio Grande Western Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, and Southern Pacific Company, plaintiffs, and American Trucking Associations, Inc., Regular Common Carrier Conference, Freight Forwarders Institute, Transcontinental Bus System, Inc., American Buslines, Inc., Arkansas Motor Coaches Ltd., Inc., Bayshore Bus Lines, Inc., Continental Bus System, Inc., Continental Crescent Lines, Inc., Continental Panhandle Lines, Inc., Continental [fol. 542] Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver-Colorado Springs-Pueblo Motorway, Denver-Salt Lake-Pacific Stages, Inc., Continental Pacific Lines, Inc., Midwest Buslines, Inc., Smoky Mountain Stages, Inc., Tennessee Trailways, Inc., Union Bus Lines, Inc., Muscatine, Davenport and Clinton Bus Company, Ringsby Truck Lines, Inc., Navajo Freight Lines, Inc., Denver Chicago Trucking Company, Inc., Illinois-California Express, Inc., Pacific Intermountain Express Co., Transcon Lines, Watson-Wilson Transportation System, Inc., Western Gillette, Inc., and Consolidated Copperstate Lines, intervening plaintiffs in the above-entitled action, hereby appeal to the Supreme Court of the United States

[File endorsement omitted]

from the final judgment entered in this action on April 11, 1966, dismissing the complaints of the plaintiffs and intervening plaintiffs.

This appeal is taken pursuant to 28 U.S.C., Sections 1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the record in the cause for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

Documents filed in Finance Docket No. 23324:

1. Application filed October 7, 1964.
2. Supplement to Application filed October 13, 1964.
3. Petition of Freight Forwarders Institute, filed October 20, 1964.
4. Petition and Protest of Southern Pacific Company, filed October 20, 1964.
5. Petition and Protest of The Denver and Rio Grande Western Railroad Company, filed October 22, 1964.

[fol. 543] 6. Petition of Transcontinental Bus System, Inc., et al filed October 22, 1964.

7. Petition and Protest of National Trailways Bus System, filed October 22, 1964.
8. Petition and Protest of The Atchison, Topeka and Santa Fe Railway Company, filed October 22, 1964.
9. Petition of Transcontinental Bus System, Inc., et al., filed October 23, 1964.
10. Petition and Protest of St. Louis Southwestern Railway Company and St. Louis Southwestern Railway Company of Texas, filed October 28, 1964.
11. Petition and Protest of The Missouri Pacific Railroad Company, filed November 2, 1964.

12. Petition of The Greyhound Corporation, filed November 9, 1964.

13. Petition of the United States Department of Justice, filed November 9, 1964.

14. Petition and Protest of American Trucking Associations, Inc., and Regular Common Carrier Conference, filed November 9, 1964.

15. Return to Information Request to Railway Express Agency, Incorporated, filed November 18, 1964.

16. Reply of Railway Express Agency, Incorporated, filed November 18, 1964.

17. Order of the Interstate Commerce Commission, entered December 2, 1964.

18. Petitions for Leave to Intervene of Denver Chicago Trucking Company, Inc., et al., filed January 21, 1965.

19. Order of the Interstate Commerce Commission, entered February 5, 1965.

Documents filed in Finance Docket No. 23374:

20. Complaint filed November 3, 1964.

21. Notice of the Interstate Commerce Commission dated November 13, 1964.

22. Answer of Railway Express Agency, Incorporated, filed December 2, 1964.

23. Motion of Railway Express Agency, Incorporated, filed December 2, 1964.

24. Answer of The Greyhound Corporation, filed December 3, 1964.

25. Motion of The Greyhound Corporation, filed December 3, 1964.

[fol. 544] 26. Reply of Southern Pacific Company, filed December 21, 1964.

Documents filed in Finance Dockets Nos. 23324 and 23374:

27. Order of the Interstate Commerce Commission, entered March 15, 1965.

28. Petition of American Trucking Associations, Inc., and Regular Common Carrier Conference, filed April 2, 1965.

29. Petition of Denver Chicago Trucking Company, Inc., et al., filed April 7, 1965.

30. Petition of Freight Forwarders Institute, filed April 8, 1965.

31. Reply of Railway Express Agency, Incorporated, filed April 9, 1965.

32. Petition of Transcontinental Bus System, Inc., et al., filed April 14, 1965.

33. Petition of St. Louis Southwestern Railway Company and St. Louis Southwestern Railway Company of Texas, filed April 14, 1965.

34. Petition of Freight Forwarders Institute, filed April 14, 1965.

35. Petition of Southern Pacific Company, filed April 14, 1965.

36. Petition of The Atchison, Topeka and Santa Fe Railway Company, filed April 15, 1965.

37. Petition of The Denver and Rio Grande Western Railroad Company, filed April 15, 1965.

38. Notice of the Interstate Commerce Commission, dated April 16, 1965.

39. Reply of Railway Express Agency, Incorporated, filed April 30, 1965.

40. Corrected Order of the Interstate Commerce Commission, entered May 28, 1965.

41. Petition of American Trucking Associations, Inc., Regular Common Carrier Conference, and Motor Common Carriers for Reconsideration, filed April 15, 1965.

42. Reply of The Greyhound Corporation filed May 15, 1965.

43. Petition of Transcontinental Bus System, Inc., et al., filed June 7, 1965.

44. Order of the Interstate Commerce Commission entered June 16, 1965.

[fol. 545] 45. Order of the Interstate Commerce Commission, entered August 11, 1965.

46. Corrected Order of the Interstate Commerce Commission, entered August 11, 1965.

47. Order of the Interstate Commerce Commission, entered August 17, 1965.

Other Documents:

48. Opinion of the Court dated April 11, 1966.

49. Judgment of Dismissal dated April 11, 1966.

50. This Notice of Appeal.

III.

The following questions are presented by this appeal:

1. Whether the District Court erred in holding that under Section 20a(2) of the Interstate Commerce Act, 49 U.S.C. 20a(2), the Interstate Commerce Commission was not obliged to determine whether the transaction would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and to deny the application if the transaction would violate that section?

2. Whether the District Court erred in holding that the Commission had the discretion to approve the transaction without determining its probable anticompetitive impact?

3. Whether the District Court erred in holding that the Commission had discretion to approve the transaction, where the Court concluded that the Commission had not made any determination respecting Section 5(4) of the Interstate Commerce Act, 49 U.S.C. 5(4)?

4. Whether the District Court erred in holding that the Interstate Commerce Commission had not made any determination respecting Section 5(4) of the Interstate Com- [fol. 546] merce Act, 49 U.S.C. 5(4); and, if the Commission did make such a determination, whether its action was supported by the record?

5. Whether the District Court erred in holding that the Interstate Commerce Commission had discretion to approve the transaction without conducting a hearing under Sections 20a(2) or 5(7) of the Interstate Commerce Act, 49 U.S.C. 20a(2), 5(7), or under Section 11 of the Clayton Act, 15 U.S.C. 21?

6. Whether the District Court erred in holding that the Commission made requisite findings and properly stated the basis of its decision?

Dated: May 2, 1966.

Respectfully submitted,

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[fol. 547]

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Robert S. Gast, Jr., Lee, Bryans, Kelly & Stansfield, 550 Fifteenth Street, Denver, Colorado 80202 (Phone 222-3524), Attorneys for Appellants.

[fol. 549] Certificate of Service (omitted in printing).

[fol. 551]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 9205

[Title omitted]

SUPPLEMENTAL DESIGNATION OF TRANSCRIPT OF RECORD TO NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 25, 1966

Come now the plaintiffs and intervening plaintiffs in the above entitled action, appellants pursuant to their Notice of Appeal to the Supreme Court of the United States heretofore filed in this action, and give notice of Supplemental Designation of Transcript of Record to be transmitted to the Supreme Court of the United States.

Appellants hereby strike designations Nos. 48, 49 and 50 of paragraph II in their Notice of Appeal to the Supreme Court of the United States heretofore filed and in lieu thereof submit the following document designations under the sub-caption "Other Documents" of paragraph II in the Notice of Appeal as designations in addition to Documents 1 through 47 as follows:

[File endorsement omitted]

Other Documents:

48. Complaint of The Denver and Rio Grande Western Railroad Company, et al.

49. Complaint of intervening plaintiffs American Trucking Associations, Inc., et al.

50. Complaint of intervening plaintiff Freight Forwarders Institute.

[fol. 552] 51. Complaint of intervening plaintiffs Ringsby Truck Lines, Inc., et al.

52. Complaint of intervening plaintiffs Transcontinental Bus System, Inc., et al.

53. Answer of intervenor-defendant Railway Express Agency, Incorporated.

54. Answer of intervenor-defendant The Greyhound Corporation.

55. Amended Answer of intervenor-defendant Railway Express Agency, Incorporated.

56. Answer of intervenor-defendant The Greyhound Corporation to the Complaint of intervening plaintiffs American Trucking Associations, Inc., et al.

57. Answer of intervenor-defendant The Greyhound Corporation to the Complaint in Intervention of Ringsby Truck Lines, Inc., et al.

58. Answer of intervenor-defendant The Greyhound Corporation to Complaint of intervening plaintiff Freight Forwarders Institute.

59. Answer of intervenor-defendant Railway Express Agency, Incorporated to Complaint of intervenor-plaintiffs American Trucking Associations, Inc., et al.

60. Answer of intervenor-defendant Railway Express Agency, Incorporated to Complaint of intervenor-plaintiffs Ringsby Truck Lines, Inc., et al.

61. Answer of intervenor-defendant Railway Express Agency, Incorporated to Complaint of intervenor-plaintiff Freight Forwarders Institute.

62. Amended Motion for Leave to File Supplemental Complaint of The Denver and Rio Grande Western Railroad Company.

63. Motion for Leave to File Supplemental Complaint of American Trucking Associations, Inc., et al.

64. Motion for Leave to File Supplemental Complaint of Freight Forwarders Institute.

65. Motion for Leave to File Supplemental Complaint of Ringsby Truck Lines, Inc., et al.

66. Stipulation on or about October 4, 1965 relating to the Motions for Leave to File Supplemental Complaints.

67. Order concerning Supplemental Complaints, Answers thereto, and briefing schedule.

68. Order authorizing intervention of Transcontinental Bus System, Inc., et al., entered on or about November 15, 1965.

69. Opinion of the Court dated April 11, 1966.

70. Judgment of Dismissal dated April 11, 1966.

[fol. 553] 71. Notice of Appeal to the Supreme Court of the United States, dated May 2, 1966.

72. This Supplemental Designation to the Notice of Appeal.

Dated this 25th day of May, 1966.

Respectfully submitted,

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[fol. 554]

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Robert S. Gast, Jr., Lee, Bryans, Kelly & Stansfield, 550 Fifteenth Street, Denver, Colorado 80202, Attorneys for Appellants.

[fol. 555] Certificate of Service (omitted in printing).

[fol. 556]

IN UNITED STATES DISTRICT COURT

LETTER—Filed May 26, 1966

May 26, 1966

Hon. G. Walter Bowman,
Clerk of the United States
District Court,
District of Colorado
United States Courthouse
Denver, Colorado

Re: The Denver and Rio Grande Western RR Co., et al. vs. United States of America and Interstate Commerce Commission, et al., defendants.

Civil Action No. 9205

Dear Mr. Bowman:

Inadvertently the Supplemental Designation of Transcript of Record to Notice of Appeal to the Supreme Court of the United States which I filed yesterday did not include the Answer of the United States of America and the Answer of the Interstate Commerce Commission.

As additional designation to paragraph II of the original Notice of Appeal under the sub-caption "Other Documents" please add the following:

62A. Answer of United States of America.

62B. Answer of the Interstate Commerce Commission.

It is requested that this letter be filed as an addendum to Supplemental Designation of Transcript of Record of Notice of Appeal to the Supreme Court of the United States so that it will not be necessary for either the United States of America or the Interstate Commerce Commis-

[File endorsement omitted]

sion to make a counter-designation to include the above two documents.

I certify that a copy of this letter has been forwarded this date to all attorneys named and included in the Certificate of Service attached to the Supplemental Designation.

Royce D. Sickler, 1531 Stout Street, Denver, Colorado, 80217, One of the Attorneys for Appellants.

RDS rw

x

[fol. 557]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action 9205

[Title omitted]

ORDER TO TRANSMIT ORIGINAL PLEADINGS AND ORDERS—
Entered and Filed May 11, 1966

This Action having been appealed to the Supreme Court of the United States, it is

Ordered that the Clerk of this Court transmit to the Supreme Court of the United States all of the original pleadings, orders and certified copies of the Interstate Commerce Commission proceedings designated by the parties for inclusion in the record on appeal. It is

Further Ordered that on the completion of the proceedings, the Clerk of the Supreme Court of the United States shall return the same to the Clerk of this Court.

Dated at Denver, Colorado, this 11th day of May, 1966.

By the Court: Jean S. Breitenstein, Circuit Judge.

[fol. 558] Clerk's Certificate (omitted in printing).

[File endorsement omitted]

[fol. 559]

SUPREME COURT OF THE UNITED STATES

No. 305—October Term, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD CO., et al., Appellants,

v.

UNITED STATES, et al.

Appeal from the United States District Court for the District of Colorado.

ORDER NOTING PROBABLE JURISDICTION—October 17, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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FILED
JUN 30 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No.

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the United States District Court for the District of Colorado dismissing complaints by which appellants challenged an order of the Interstate Commerce Commission.[1] Appellants submit

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[1] The appellants consist of railroads, freight forwarders, motor carriers, and motor bus companies. They are: The Denver and Rio Grande Western Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; Southern Pacific Company; Ringsby Truck Lines, Inc.; Navajo Freight Lines, Inc.; Denver-Chicago Trucking Company, Inc.; Illinois-California Express, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Western Gillette, Inc.; Consolidated Copperstate Lines; American Trucking Associations, Inc.; Regular Common Carrier Conference; Freight For-

this Statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the District Court, which is reported unofficially at 14 Fed. Car. Cases ¶ 81, 814, is reproduced as Appendix A hereto. The order of the Interstate Commerce Commission, which is unreported, is reproduced as Appendix B.

Jurisdiction

This suit was brought under 28 U.S.C. 1336, 1398, 2321-2325, to set aside an order of the Interstate Commerce Commission. The final judgment of the three-judge District Court was entered on April 11, 1966, and the notice of appeal was filed on May 3, 1966. This Court has jurisdiction under 28 U.S.C. 1253 and 2101(b) to review the judgment of the District Court on direct appeal. *United States* v. *Drum*, 368 U.S. 370; *Dixie Carriers* v. *United States*, 351 U.S. 56.

Questions Presented

The order of the Interstate Commerce Commission here in issue approved a proposed stock transaction between Railway Express Agency, Inc. (hereinafter "REA") and the Greyhound Corporation (hereinafter "Greyhound")

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warders Institute; Transcontinental Bus System, Inc.; American Buslines, Inc.; Arkansas Motor Coaches Ltd., Inc.; Bayshore Bus Lines, Inc.; Continental Bus System, Inc.; Continental Crescent Lines, Inc.; Continental Panhandle Lines, Inc.; Continental Southern Lines, Inc.; Continental Tennessee Lines, Inc.; Denver-Colorado Springs-Pueblo Motorway; Denver-Salt Lake-Pacific Stages, Inc.; Continental Pacific Lines, Inc.; Midwest Buslines, Inc.; Smoky Mountain Stages, Inc.; Tennessee Trailways, Inc.; Union Bus Lines, Inc.; and Muscatine, Davenport and Clinton Bus Company.

The appellees, in addition to the United States, are the Interstate Commerce Commission, Railway Express Agency, Inc., and The Greyhound Corporation.

as in the "public interest" and for a "lawful object" under sections 20a(2) and 214 of the Interstate Commerce Act, 49 U.S.C. 20a(2), 314. The questions presented are:

1. Whether, in view of the Commission's statutory obligation under section 11 of the Clayton Act, 15 U.S.C. 21, to enforce section 7 of that Act, 15 U.S.C. 18, and in view of the bar to private relief of section 16 of that Act, 15 U.S.C. 26, the Commission was obliged to determine whether the transaction would violate section 7 and to refuse approval if it would violate that section.

2. Whether the Commission was obliged in any event to evaluate the probable impact of the proposed transaction upon competition and to weigh that impact together with other factors relevant to the "public interest."

3. Whether the Commission was obliged to determine whether the proposed transaction would violate section 5(4) of the Interstate Commerce Act, 49 U.S.C. 5(4), because it would result in the acquisition of "control" by Greyhound of REA, and to refuse approval if there would be such a violation.

4. Whether the Commission's order sets forth with sufficient clarity the findings and rationale supporting its decision.

5. Whether the Commission had discretion to approve the proposed transaction without conducting a hearing.

Statutes Involved

The statutes involved are portions of sections 7, 11, and 16 of the Clayton Act, 15 U.S.C. 18, 21, 26; portions of sections 5, 20a, and 214 of the Interstate Commerce Act, 49 U.S.C. 5, 20a, 314; and section 8(b) of the Administrative

Procedure Act, 5 U.S.C. 1007(b), all of which are set forth in Appendix C hereto.

Statement

Basically, the question in this case is whether the Interstate Commerce Commission discharged its statutory responsibilities in approving an acquisition by appellee Greyhound—the second ranking carrier of express freight—of a substantial stock and management interest in appellee REA —the first ranking carrier of express freight.

This controversy began with an application by REA under sections 20a(2) and 214 of the Interstate Commerce Act, 49 U.S.C. 20a(2), 314, for approval by appellee the Interstate Commerce Commission of the issuance by REA of 20% of its stock to Greyhound. Section 20a(2) requires carriers subject to Part I of the Act to secure Commission approval for the issuance of securities, and empowers the Commission to approve only if the transaction is "compatible with the public interest" and "for some lawful object within [the applicant's] corporate purposes." Section 214 applies section 20a to carriers subject to Part II, such as REA. (For the sake of brevity, we hereafter refer only to section 20a.)

In a related Commission proceeding, appellant Southern Pacific Company, an REA stockholder, filed a complaint under section 5(7) of the Act, 49 U.S.C. 5(7), seeking an investigation to determine whether the proposed stock sale would violate section 5 because it would result in the acquisition by Greyhound of "control" of REA without the approval of the Commission.

Appellee the United States and appellants intervened in opposition to REA's application, while Greyhound intervened in its support. The United States maintained that the Commission, in view of its obligation under section 11

of the Clayton Act, 15 U.S.C. 21, to enforce that Act, should not approve the stock sale without determining whether it would violate section 7 of the Act, 15 U.S.C. 18.[2] Other interveners raised both the impact on competition question and the section 5 "control" question.[3]

In accord with REA's request, the Commission denied the application of interveners for an evidentiary hearing. Instead, the Commission based its decision solely upon the written materials submitted by REA. The materials disclosed the following:

The negotiations between Greyhound and REA began as an attempt by Greyhound to secure a majority of REA stock.[4] At the request of the REA Board of Directors, Greyhound offered to purchase 67% of REA's stock.[5] While the details of what happened respecting that offer do not appear in the record, REA stated generally to the Commission that the offer was unsuccessful because some REA stockholders, who held a right of first refusal on offers to sell by other stockholders, indicated they would exercise that right if the stock were offered to Greyhound.[6]

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[2] Petition Of The United States Department Of Justice For Leave To Intervene, For Consolidation Of This Proceeding With A Proceeding To Determine The Lawfulness Of The Proposed Transaction Under Section 7 Of The Clayton Act, For A Full Evidentiary Hearing, And A Pre-Hearing Conference.

[3] See, *e.g.* the Petition of Transcontinental Bus System, Inc., and the Petition For Reconsideration of the American Trucking Associations, Inc.

[4] Return [by REA] to Information Request to REA (hereinafter "REA Return"), p. 1. ("In January 1964, representatives of Greyhound approached REA with a proposal . . . to acquire a controlling interest in REA.")

[5] REA Return, p. 1; *id.*, Annex A(1).

[6] REA Return, pp. 1-2.

In order to circumvent this obstacle, "consideration was given to the possibility of Greyhound's acquisition of 500,000 shares of authorized but unissued REA stock, these shares not being subject to the right of first refusal."[7]

The ensuing negotiations, which led to the final contract, are of primary importance. The most significant features of the negotiations, which we describe fully below, were that Greyhound's acknowledged purpose was to achieve a "coordination" of REA and Greyhound express service; that the Board and management of REA shared that goal; that Greyhound and REA reached tentative agreements upon the particular types of "coordination" that would be beneficial; that those agreements reflected a desire virtually to eliminate competition between the two companies; that Greyhound's desire to acquire a majority stock interest persisted, but that Greyhound was willing to wait for the acquiescence of the REA minority stockholders; that Greyhound believed that a 20% interest would be a sufficient basis for effecting coordination, provided the 20% offer was approved by a large enough majority of REA stockholders so that the cooperation of REA management would be assured; and that over 80% of REA stockholders did accept. In more detail, the record discloses the following:

About five months after Greyhound's offer to acquire a majority interest, officers of the two companies concluded a 2½ day conference with a "Memorandum of Understanding" respecting "Potential Benefits By Consolidation or Merger of Certain Activities of the Two Companies." The provisions of this document—a blueprint for the elimination of competition—are described in detail in

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[7] REA Return, p. 2.

the margin.[8] What was contemplated was a fusion of REA and Greyhound express activities. Thus, from the physical standpoint, they would combine their terminals, their depot

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[8] The memorandum may be summarized as follows:

1. Because Greyhound's terminal facilities are strained and becoming more and more inadequate, it would use REA's and "REA would perform the terminal services, other than loading and unloading of buses. . . ."

2. Greyhound would take over the service and maintenance work on all REA automotive equipment in 37 cities where now each has garage operations, and perhaps in 11 more cities. Moreover, Greyhound has "headquarters staff and field supervision sufficient with the addition of a few people to take care of the staff work and field supervision on all REA automotive equipment."

3. REA and Greyhound would utilize "joint communication facilities and the present and proposed data processing system and machine accounting of REA," and they would use to the extent possible joint billing and accounting procedures.

4. The two companies would use the same salesmen and the same advertising program and agency.

5. Wherever REA express depot and express office facilities were satisfactory among the 683 points where both companies have such facilities, Greyhound could use the REA facilities.

6. There is a "very strong possibility . . . for what could be termed a package bus distribution service tied in with REA's Air Express, highway or rail operations." Thus, as to Air Express, off-airline points could be reached by tacking on Greyhound bus express. And "[r]ail-bus express service would create a new capability for the two carriers to compete in the ltl market."

7. Because Greyhound has about 50% excess capacity at the present between other than principal cities, it "could and would offer to REA an attractive linehaul cost" so that REA could utilize Greyhound's capacity instead of using its own trucks or third party trucks. "This will eliminate the expense of REA's over-the-road operations in this category or the third party truck routes. . . ."

8. "Other possibilities" include:

   a. Joint purchasing.
   b. REA's utilizing Greyhound's highway safety supervisors and line representatives.
   c. Greyhound's using REA's research group.
   d. "[A] possibility of some consolidated effort or assistance between the Boothe Leasing Corporation of Greyhound and REA Leasing Corporation."
   e. Greyhound's using REA to perform pick-up and delivery for its express movements.
   f. Greyhound's subsidiary, Greyhound Van Lines, could, as to less than van load volume, have REA provide a rail container service.
   g. Again as to Greyhound Van Lines, REA could act as sales agent.

and express office facilities, their service and maintenance work, their communication, data processing, and accounting facilities and procedures, their safety supervisors and line representatives, and their research activities. From a sales standpoint, they would use the same salesmen, the same agency, and the same advertising program. And, from an operational standpoint, Greyhound would use REA to perform terminal and pick-up and delivery services on Greyhound express movements; REA would use Greyhound's express service to tack on to REA's air and railway express service to reach off-airline and off-rail points; and Greyhound would offer REA an especially attractive arrangement for employing Greyhound instead of REA or third-party trucks to perform the underlying transportation for REA express service between other than principal cities, where Greyhound has about 50% excess capacity.

Only about three weeks later, the REA Board approved "in principle" the suggestion of Greyhound that it acquire a 20% REA stock interest.[9] Thereupon Greyhound submitted a formal offer in which it stated that its "interest in REA . . . stems primarily from our views as to the improvements which could be realized through combination and correlation of certain of our facilities and services"; that the "studies which we have made separately and jointly with your representatives confirm that there are tremendous possibilities in these respects"; but that "in order to give Greyhound an incentive to pursue these possibilities it should have at least a 20% equity interest in REA." Accordingly, Greyhound incorporated in its offer the requirement that REA commit itself to "consider seriously and work toward a long-term agreement between REA and Greyhound to consolidate operating functions

[9] REA Return, Annex A(3).

and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies to be shared by REA and Greyhound." Greyhound also stated that it would accept additional REA shares, but that it did not insist upon more than a 20% interest because it did not want controversy with REA minority stockholders to "delay" or "frustrate completely" the contemplated "improvements in service." Thus, Greyhound was willing to "leave to the future" the question of further stock acquisitions.[10]

A committee of the REA Board negotiated with Greyhound representatives respecting certain modifications—not here material—in the proposal, and that committee reported that Greyhound "was reluctant to make another formal offer to REA because it was not clear to them . . . that such a proposal would receive sufficient support from this Board and the REA stockholders *to insure that a satisfactory working agreement between REA and Greyhound would be possible.*" (Emphasis supplied.) However, according to the REA committee, Greyhound would "look favorably upon a firm offer from REA . . . if it were adopted by such a substantial vote of the REA Board and stockholders *as to carry some measure of assurance that a constructive working relationship could be developed.*" (Emphasis supplied.) [11]

REA's President stated to the Board that "in the opinion of the management of REA it would be greatly in the interest of REA" to sell the stock to Greyhound "*and to enter into working arrangements with Greyhound* which would result in substantial savings for REA and improved service to the public." (Emphasis supplied.)[12]

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[10] REA Return, Annex A(4).

[11] REA Return, Annex A(6).

[12] REA Return, Annex A(6).

The REA Board thereupon called a stockholders meeting to approve the sale, and in the Board's proxy statement the negotiations were described in terms of Greyhound's "obtaining an equity interest in the Corporation with the ultimate purpose of achieving certain economies which could be realized through combination and correlation of certain of the facilities and services of Greyhound and the Corporation."[13] The Board had approved 14 to 3,[14] and the stockholders approved by over an 80% majority.[15]

The final offer, which was accepted by Greyhound, had the following relevant terms:

a. Greyhound would purchase 500,000 shares of REA's authorized but unissued stock.

b. Greyhound would name 20% of the REA Board.

c. The REA Board was to adopt—as it did—a resolution "declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage."

d. For a period of 60 days after the closing of the 20% transaction, Greyhound would offer to purchase up to 1,000,000 additional shares of REA stock from present stockholders.[16]

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[13] REA Return, Annex B, p. 2.

[14] REA Return, Annex B, p. 5.

[15] REA Return, p. 5.

[16] Application of Railway Express Agency, Incorporated, Exhibit 4; REA Return, Annex A(6).

These, then, were the facts upon which the Commission was asked to decide whether the transaction would have an anticompetitive impact that was relevant to the question whether it was "compatible with the public interest" and for a "lawful object" under section 20a(2); whether, in view of the Commission's responsibilities under section 11 of the Clayton Act, the Commission would have to determine that the acquisition would not violate section 7 of the Clayton Act before giving its approval; and whether the transaction would involve the acquisition by Greyhound of "control" of REA within the meaning of section 5 of the Interstate Commerce Act, so that approval could be given only in a section 5(2) proceeding.

The Commission granted REA's application and denied both the request for a section 5(7) investigation and the request for a Clayton Act section 11 hearing. As we read the order, the Commission disposed of the section 7 issue simply by saying that a determination of that issue "would not be appropriate at this time," without stating why, and held that the transaction would not result in an illegal acquisition of control because Greyhound's position in REA would not be dominant. However, except in our discussion of the fatally ambiguous character of the order (*infra* pp. 24-27), we accept *arguendo* the lower court's reading of the order, which we describe below.

Appellants' suit to set aside the order was dismissed by a three-judge federal court in the District of Colorado. As the court construed the order, the Commission declined to pass upon questions relating to anti-competitive impact and acquisition of control because "determination of [those] questions must await developments subsequent to the issuance of the 500,000 shares of REA stock to Greyhound" (App. A, *infra* p. 39). More particularly, the court thought the Commission put those questions aside

because Greyhound's 60-day offer to purchase an additional 1,000,000 shares might result in relevant changes in the situation. Thus, 60 days after Commission approval of the 20% transaction, while if no REA stockholders offered shares to Greyhound there would be no change, if such offers were made Greyhound might own more than 20% —up to slightly over 50%—or the minority stockholders might exercise their right of first refusal and purchase these shares.

The court held that in these circumstances the Commission "took the proper course" in approving the 20% transaction without considering its anticompetitive impact, or whether it would violate section 7, or whether it would violate section 5. While rejecting REA's contention that a section 20a(2) proceeding should never embrace such considerations, the court concluded that, in view of future uncertainties, the Commission was not required to pay heed to such factors in this case. In so ruling, the court relied upon this Court's decision in *Seaboard Air Line R.R.* v. *United States,* 382 U.S. 154, stating: "We see no reason why the principles announced in *Seaboard* as applicable to a § 5 merger proceeding do not apply to a § 20a stock issuance proceeding" (App. A, *infra* p. 39).

Upon institution of the litigation, the Commission stayed its decision pending further order. That stay is still in effect.

The Questions Are Substantial

This case, from a factual standpoint, involves the establishment of a close relationship between the nation's two largest carriers of express that is likely to produce a serious impact on competition. Consequently, the case is of large economic significance. From a legal standpoint, the issues presented are of considerable importance in the administration of the Interstate Commerce and Clayton Acts. By section 11 of the Clayton Act, 15 U.S.C. 21, the Congress

imposed upon the Commission the obligation to enforce section 7 with respect to carriers under its jurisdiction—the Commission "shall issue" a complaint whenever it "shall have reason to believe" that there is a violation of section 7. That obligation is particularly heavy because the Congress also, by section 16 of the Clayton Act, 15 U.S.C. 26, disabled private parties from seeking judicial injunctive relief respecting transactions falling within the Commission's section 7 jurisdiction. Nonetheless, in this case the Commission, in a proceeding under section 20a of the Interstate Commerce Act, 15 U.S.C. 20a, ruled that it was not obliged to consider the probable anticompetitive impact of the REA-Greyhound transaction in determining whether the transaction was in the "public interest" and for a "lawful object"—the relevant section 20a standards. The lower court agreed. We believe that decision was incorrect. At the least, the decision raises questions that are substantial.

1. *The probable anti-competitive impact of the REA-Greyhound transaction.* Neither the Commission nor the lower court has denied that, putting aside possible future developments, the REA-Greyhound transaction would have a serious anticompetitive impact, nor that the transaction would violate section 7 of the Clayton Act. Both Commission and court simply refused to deal with those issues. The fact is that the record establishes the probability of a serious anti-competitive effect and a section 7 violation, and this is so whatever the outcome of the 60-day offer.

It is settled that the term "the whole or any part of the stock" in section 7 is to be read literally, so that the acquisition of a minority stock interest violates the statute if the result "may be substantially to lessen competition or to tend to create a monopoly" "in any line of commerce in any section of the country." *United states* v. *Du Pont & Co.*, 353 U.S. 586 (1957) (23% stock interest); *Briggs*

Manufacturing Co. v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960) (22% interest); *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D. N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958) (23% interest); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F.Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953) (24% interest).

Since the Commission refused to explore the matter, there is no detail in the record as to the next question—the relevant market. However, it was asserted before the Commission,[17] and not disputed by anyone, that the relevant market is the transportation of express freight. This type of transportation is differentiated from other types primarily in terms of expedition. Traditionally the service has commanded a premium price, and in consequence its use generally has been confined to items requiring speedy delivery and of more than ordinary value. See, *e.g.*, *Coordination of Motor Transportation*, 182 I.C.C. 263, 348 (1932); *San Francisco Wholesale Dairy Produce Exc.* v. *American Ry. Exp. Co.*, 78 I.C.C. 737, 740 (1923); *R.R. Commissioners of Florida* v. *Southern Express Co.*, 44 I.C.C. 645, 647 (1917); *Davies Spur, Wash., Express Rates*, 43 I.C.C. 143, 146 (1917); *Kindel* v. *Adams Express Co.*, 13 I.C.C. 475 (1908).

The final question is whether, in this market, the acquisition "may" either "substantially lessen competition" or "tend to create a monopoly." As to one critical consideration—share of the market—the record is silent because the Commission refused to seek the relevant information. However, it was asserted in the Commission proceedings, and not denied, that REA and Greyhound are respectively the first and second ranking carriers of express.[18] And, of course, the Commission knew this to be true, as does anyone

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[17] See Petition of American Trucking Associations, Inc., et al., for Reconsideration, p. 6.

[18] Petition of American Trucking Associations, Inc., et al., for Reconsideration, p. 6.

with any familiarity with the transportation industry. Moreover, data subject to judicial notice, and brought to the attention of the lower court, indicates that REA has a virtual monopoly of express traffic, with Greyhound its only substantial competitor. Thus, the annual reports filed by carriers with the Commission indicate that in 1964 REA, with revenue of approximately $412,000,000, controlled about 88% of the market; Greyhound, with express revenue of about $33,000,000, had about 7%; and all other motor carriers of passengers combined, with express revenues of approximately $21,000,000, had most of the balance.[19]

Given this market dominance, it is evident that the proposed acquisition would probably violate section 7. Under *United States* v. *Philadelphia National Bank*, 374 U.S. 321, the market positions of REA and Greyhound would place a heavy burden on them to prove that there would not be a lessening of competition. In that case, the Court held that a 30% market share was "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. . . ." *Id*, at 363, 364. See also, *e.g.*, *United States* v. *Pabst Brewing Co.* — U.S. — (June 13, 1966); *United States* v. *Von's Grocery Co.*, — U.S. — (May 31, 1966)

The facts of record in this case strongly reinforce the inference that competition would be lessened. To recapitulate briefly, Greyhound began with an intention of securing a majority stock interest in REA and still harbors that purpose, but is willing to wait until the opposition of a few REA stockholders dissolves; in the meantime, Grey-

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[19] Some motor carriers of freight hold express certificates, and we were not able to locate express revenue data as to them. However, we are confident that the data respecting these other carriers would not affect the Clayton Act question at all; and the Commission did not respond to our invitation in the lower court to adduce any additional figures from its files if it thought they might make a difference.

hound is satisfied that a 20% stock interest and a 20% representation on the REA Board—which cannot be modified without Greyhound's consent—will serve its purposes, since those purposes are shared by REA management, directors, and holders of over 80% of REA's stock; and those purposes are to effect a consolidation of REA and Greyhound express activities.

Even without specification as to the type of "consolidation" envisioned, this intercorporate arrangement predictably would mute competition between REA and Greyhound, and, in view of their market strength, would impair the competitive position of others and tend toward monopoly. Moreover, the "Memorandum of Understanding" between the two companies indicates, in brief, that REA is to use Greyhound transportation, supporting services, and facilities instead of its own or that of third parties where that appears most beneficial, and that Greyhound is to do the same. That there will no longer be active competition is strikingly evidenced by the fact that the two companies contemplate using the same salesmen and sales agency. Such an elimination of competition will drastically curtail the opportunity of third party express carriers to compete with Greyhound for REA business, with REA for Greyhound business, and with both of them for the patronage of the public.

While, if REA's minority stockholders were to acquire an additional 1,000,000 shares of stock, the precise degree of impact of the REA-Greyhound transaction might be affected, the conclusion that there would in any event be a section 7 violation would not be changed. Three leading lower court decisions so establish. In *Briggs Manufacturing Company* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960), in *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958), and

in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953), acquisitions of a 22% interest, a 23% interest, and a 24% interest, respectively, were held violative of section 7 despite the fact that the company whose stock was being acquired was vigorously opposed to the acquisition. In each of these cases, the court placed particular stress upon the desire of the acquiring company ultimately to gain a majority interest, and upon the fact that even their minority interest would enable them to place a representative upon the board of directors. "[W]ith two sympathetic representatives on the Board, Crane will have driven the wedge in its attempts to gain control of Briggs' assets." 280 F.2d, at 750.[20] See also *Chesapeake & Ohio Railway Company Purchase*, 271 I.C.C. 5 (1948) (6.2% stock interest coupled with board representation.)

In sum, the circumstances disclosed by the record in this case, regardless of the result of Greyhound's 60-day offer, establish a probable violation of section 7. That section, as this Court has recently observed once again, *United States* v. *Pabst Brewing Co.* — U.S. — (June 13, 1966), was designed to arrest restraints on trade and monopolies "in their incipiency and before consummation. . . ." S. Rep. No. 698, 63d Cong., 2d Sess. 1. See also, *e.g.*, *United States* v. *DuPont & Co.*, *supra*, at 597; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317-318. And with respect to the monopoly standard, "[U]nder section 7 it is not necessary

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[20] To the same effect: "Section 7 includes within its scope a percentage interest sufficient to elect nominees to the Board of Directors." 185 F. Supp., at 184. Placing a nominee upon the board would "limit the effectiveness of the competition." 152 F. Supp., at 394. The presence of a representative on the board "would create a situation in which Benrus would have power to discourage the vigor of competition by Hamilton and so to embarrass and impede Hamilton's management that it might well be driven to unwanted collaboration or to a merger as the least of two evils." 114 F. Supp., at 314.

. . . to find that [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud." *Transamerica Corp.* v. *Board of Governors*, 206 F.2d 163, 169 (3d Cir. 1953), quoted with approval in *United States* v. *DuPont & Co., supra*, at 592-593. Surely those purposes would be frustrated by the proposed REA-Greyhound transaction.

2. *The alternatives open to the Commission.* The significance of the legal issues raised upon the basis of this record may be most clearly perceived in the context of the different courses of action the Commission might have taken. Basically, the options were four:

First, the Commission could have denied REA's application on the ground that, whatever the outcome of the 60-day offer, the probable anticompetitive impact of the acquisition was such that REA had not met its burden of establishing that the transaction would comport with the "public interest" and would be for a "lawful object."[21]

Second, if the Commission thought that the result of the 60-day offer might affect its judgment, it could have denied the application because the record did not establish "public interest" or "lawful object," noting, however, that REA could renew the application if the terms of the transaction were modified so that Greyhound's offer to purchase additional shares would expire *before* application to the Commission so that the stock interests of the various parties would be fixed.

Third, the Commission could have held an evidentiary

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[21] The applicant, of course, has the burden of proof. See *Shein* v. *United States*, 102 F. Supp. 320, 324 (D.N.J. 1951); *Houf Transfer* v. *United States*, 105 F. Supp. 851, 855 (W.D. Va. 1952).

hearing to determine if either of the above actions should be taken.

If the Commission had adopted any of these courses, REA's only "complaint" as to the procedure could have been that the Commission had insisted upon scrutinizing the probable anticompetitive impact of the proposed transaction before approving it.

The Commission, however, chose a fourth alternative: It approved the transaction without evaluating at all its probable anticompetitive effect on the ground that the 60-day offer might work changes in relevant facts. The impact of this action upon appellants is severe. First, they are deprived of any *right* to have any tribunal consider the anticompetitive effect of the transaction. They may only in the future ask the Commission in its discretion to investigate the "control" question under section 5(7) of the Interstate Commerce Act and the section 7 question under section 11 of the Clayton Act. Given the history of Clayton Act proceedings in the Commission,[22] appellants cannot be sanguine about the fate of such applications, particularly if the 60-day offer does not result in an increase in Greyhound's stock ownership. Nor can the appellants turn to the courts to restrain the acquisition or to compel divestiture, for section 16 of the Clayton Act, 15 U.S.C. 26, bars injunctive relief against companies subject to Commission jurisdiction.

Moreover, even were appellants ultimately to persuade the Commission to inaugurate an investigation, the 20% stock transaction approved by the Commission, as well

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[22] We have discovered only three cases—and they are decades old—in which the Commission has acted under Section 11 of the Clayton Act. See *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 160 I.C.C. 785 (1930); *Interstate Commerce Commission* v. *Pennsylvania R. Co.*, 169 I.C.C. 618 (1930); and *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 152 I.C.C. 721 (1929).

as any other transactions occurring pursuant to the 60-day offer, would already have occurred. Thus appellants would be deprived of the most effective remedy—a restraining order blocking the acquisition until final adjudication. See, *e.g.*, *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, —— n. 5 (June 14, 1966), citing with approval *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186. Thus, given the normal duration of this type of litigation—in oral argument REA counsel gave a "conservative estimate" of "two or three years" (Tr. p. 47)—much of the damage feared by appellant might already have been done. In this connection, the vulnerability of appellant motorbus carriers is particularly instructive. As their 1965 reports filed with the Commission reveal, in that year 14.33% of their gross revenue was derived from package express service, and that amounted to over twice their net profit after taxes and was substantially equivalent to their net profit before taxes.[23] In short, express service revenue is substantially the measure of profitability of these companies, who constitute the only significant competitors of Greyhound in the motorbus field.

The question, then, is whether the lower court correctly construed the relevant statutory provisions to permit the Commission to approve the transaction as consonant with

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[23] In the Commission proceedings, this data was not pleaded in detail because appellants anticipated an evidentiary hearing. Thus appellant motor bus carriers simply alleged in conclusory terms that "[n]o motorbus company could hope to meet the competition offered by a consolidation of the R.E.A. and Greyhound terminal facilities and operations." Petition of Transcontinental Bus System, Inc., et al. Seeking Leave to Intervene p. 7. However, the data, as we have indicated, is contained in the annual reports appellants are required to file with the Commission, and hence is subject to judicial notice. Moreover, the Commission, because of its general knowledge of motorbus business, doubtless was aware of the importance to appellants of express traffic.

the "public interest" and for a "lawful object" without evaluating competitive factors.

3. *Misapplication of the* Seaboard *decision.* In upholding the Commission's action, the lower court, as we have indicated (*supra*, p. 12), relied upon *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154. The court's error was twofold.

First, assuming for the moment that the *Seaboard* principle is applicable in a section 20a(2) proceeding as well as in a section 5 merger or acquisition of control proceeding, that principle does not support the lower court's decision. To be sure, under *Seaboard* the Commission is not obliged to apply strictly the standards of section 7 in evaluating the competitive impact of a transaction. But *Seaboard* does *not* hold—and this Court has *never* held—that the Commission may altogether decline to weigh the probable anticompetitive effect of a proposed transaction on the ground that some of the relevant facts are uncertain. To the contrary, in *Seaboard* this Court reaffirmed its prior decisions in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, that " '[t]he Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy." 321 U.S., at 87.' " (Brackets in original.) 382 U.S., at 156.[24] If there

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[24] For similar rulings respecting other regulatory statutes where the standard for agency decision is the "public interest" or the "public convenience and necessity," see *California* v. *Federal Power Comm'n*, 369 U.S. 482, 484-485; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224; *Federal Communications Commission* v. *RCA Communications*,

is to be a departure from this rule, as there has been in this case, surely it would have to be based upon the most compelling circumstances. There are none here, for it was within the control of REA and Greyhound to resolve any uncertainty raised by the 60-day offer simply by modifying the terms of their contract so that the offer would expire prior to Commission action.

The lower court's second mistake was in concluding that this Court's section 5 decisions govern in a section 20a(2) proceeding. The principle established first in *McLean Trucking Co.*, and thereafter applied in *Minneapolis & St. Louis R. Co.* and *Seaboard*—that in a section 5 case the Commission is not bound by, though it must consider, the policies of the antitrust laws—is grounded fundamentally upon the fact that the Congress, in section 5(11), has empowered the Commission to immunize mergers from the antitrust laws. See *McLean Trucking, supra, passim.* The Commission, however, cannot confer such immunity in a section 20a(2) proceeding. Section 20a(2), in contrast to section 5, contains no immunizing authority; and this Court has held that the general immunity language of section 7 confers no independent authority upon agencies, so that only the sort of explicit language incorporated in section 5 can empower an agency to insulate a company from the antitrust laws. *California* v. *Federal Power Comm'n*, 369 U.S. 482. See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351; *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 470; *United States* v. *Borden Co.*, 308 U.S. 188, 198; *United States* v. *RCA*, 358 U.S. 334.

The lower court's holding that the Commission's discretion in a section 20a(2) proceeding is the same as in a sec-

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Inc., 346 U.S. 86, 94; *City of Pittsburgh* v. *Federal Power Comm'n*, 237 F. 2d 741, 754 (D.C. Cir. 1956); *Greater Baton Rouge Port Comm'n* v. *United States*, 287 F. 2d 86, 95 (5th Cir. 1961).

tion 5 proceeding means that, despite the fact that the Commission may not immunize the transaction from the antitrust laws, and in the face of its obligation under section 11 of the Clayton Act to enforce section 7, it may authorize a transaction that will violate section 7 on the ground that the Commission believes it nontheless will be in the "public interest." (How it could be for a "lawful object" the court does not suggest.) If this holding is not plainly wrong—as we say it is—surely it is an important extension of the *Seaboard* principle that deserves plenary review by this Court.

4. *The section 5(4) question.* The foregoing analysis respecting the section 7 and impact on competition question is also applicable to the section 5 acquisition of control question. As the facts of record establish the probability of a section 7 violation, so also do they establish the probability of a violation of section 5(4), which makes it illegal for one carrier to acquire "the control or management in a common interest" of another without filing an application under section 5(2) for Commission approval after hearing. It is settled that the term "control" in section 5 embraces not only the establishment of a control relationship grounded in legal status such as the purchase of a majority stock interest, but also the establishment of any relationship, formal or informal, that "accomplish[es] a significant increase in the power of one [company] over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease [.]" *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169. This broad standard, which has been applied by the Commission in other cases,[25] is grounded

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[25] See, *e.g.*, *Chesapeake & O.R. Co. Purchase*, 271 I.C.C. 5 (1948) (6.2% interest); *Arkansas Motor Coaches—Control and Merger*, 56 M.C.C. 665, 674 (1954) (18% interest); *Greyhound Corp.-Control-Southeastern Greyhound Lines*, 57 M.C.C. 123 (1950) (10% interest); *Greyhound Corp. Investigation of Control-Southern Ltd.*, 45 M.C.C. 59, 77-82 (1946).

upon the statute itself. See section 5(4)[26] and section 1(3)(b).[27]

On this test, the Court found "control" in *Alleghany* despite the fact that Alleghany owned only 10% of the stock of the New York Central. And on the same test, the Court found control in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, where there was no stock ownership at all.[28]

Since the Commission has the obligation to enforce section 5,[29] just as it does section 7 of the Clayton Act, it erred in approving the transaction as in the "public interest" and for a "lawful object" without considering the probable violation of section 5 revealed by the record.

5. *Fatal ambiguity of the order.* To this point, we have accepted *arguendo* the lower court's interpretation of the Commission's order, namely, that the Commission declined to pass on either the impact on competition question or the section 5 question, and that it stated as its reason the

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[26] "[C]ontrol or management in a common interest . . . however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . [T]he words 'control or management' shall be construed to include the power to exercise control or management."

[27] "[S]uch reference [to 'control'] shall be construed to include action as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

[28] For other "control" situations involving no stock ownership, see *Hart* v. *Interstate Commerce Commission,* 226 F. Supp. 635 (D.Minn. 1964); *Buckeye Express, Inc.* v. *United States,* 14 Fed. Car. Cases ¶ 81,303 (S.D. Ohio 1960); *Lombard Bros., Inc.* v. *United States,* 226 F. Supp. 905 (D.Conn. 1964).

[29] In addition to section 5 itself, see section 12(1), 49 U.S.C. 12(1), which authorizes and "requires" the Commission to enforce the various provisions of Part I of the statute.

consideration that relevant circumstances might change as a result of Greyhound's 60-day offer. However, this interpretation of the order is insupportable. The order simply is not subject to any decently certain interpretation.

This Court has firmly established the requirement that "the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Securities and Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94. See also *Automatic Canteen Company* v. *F.T.C.*, 346 U.S. 61, 81; *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 187; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168; *United States* v. *Chicago, M., St.P. & P.R. Co.*, 294 U.S. 499, 510-511. This rule is not only a necessary incident of judicial review; it is specifically prescribed by statute. Section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), which applies to the Commission, *Minneapolis & St.L.R. Co.* v. *United States*, 361 U.S. 173, 193-194, requires the Commission to include in its decisions "a statement of . . . findings and conclusion, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record. . . ."

On this standard, the order should not have been sustained. As to the section 7 question, the Commission stated simply that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time. . . ." There is no explanation *why* the Commission so concluded—whether, as REA had argued, section 7 had no place in a section 20a proceeding, whether the record did not suggest a section 7 violation, whether the Justice Department should worry about section 7, *et al.* While clauses respecting the 20-day offer may be plucked out of other paragraphs of the order, those para-

graphs were plainly nothing but a general summary of all of the facts respecting the application and cannot reasonably be read as an explanation by the Commission for declining to meet the section 7 question.

As to the section 5 issue, the order is hardly any clearer. While, as has been noted, the Commission at one point said that a section 5 investigation would "not be appropriate at this time," the Commission also, in another passage, ruled that the transaction would not bring about an acquisition of control. This passage, which is set out in full in the margin, [30] can hardly be read otherwise. But if that be so, then (a) the order is internally inconsistent, (b) the lower court's construction of the order is incorrect and the question whether the Commission applied an incorrect test of "control" should have been decided, and (c) the Commission's position on section 7 becomes even more perplexing, since there could hardly be any reason for passing on the section 5 question but not the section 7 question.

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[30] "*It further appearing,* That intervenors' opposition is directed to the possibility of control of applicant by Greyhound, through the purchase of the proposed stock issue or presently outstanding shares or otherwise, and to the anticipated combination and correlation of certain of their facilities and services;

"*It further appearing,* That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York C. & St. L.R.Co. Control,* 295 I.C.C. 703 (714); . . ." App. B, *infra,* p. 44.

We submit that this order is an obvious violation of this Court's rule "that the Commission [should] not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for [the courts] to determine what really lay behind the conclusions which [the courts] are to review." *Automatic Canteen Company* v. *F.T.C., supra,* at 81. The lower court's holding—itself stated only in conclusory terms—that "the Commission order is clear and understandable" (App., *infra* p. 40) is quite incorrect.

6. *The hearing question.* The lower court stated that the "main thrust of the plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing," and disposed of that question, so far as one can tell, on the grounds that section 20a(6) leaves the question of a hearing to the discretion of the Commission and that plaintiffs' pleadings before the Commission did "not controvert any facts put of record by REA and [did] not allege any additional factual matters" (App., pp. 35, 36, *infra*). The court entirely misapprehended the "main thrust" of the attack on the order.

In fact, the hearing issue is collateral to the issues we have already discussed. If the Commission was correct in refusing to consider the impact on competition issue and the section 5 issue, then it was indisputably within the Commission's discretion under section 20a(6) to pass upon the fiscal aspects of the REA proposal without a hearing. On the other hand, if the Commission was obliged, as we maintain, to deal with those issues, then the only action that could have been taken without a hearing would have been denial of the application. Nothing turns upon whether or not the facts as stated by REA were "disputed," for those facts, as we have indicated, establish the probability of a section 7 and section 5(4) violation and the certainty of substantial

impact on competition. Hence, since REA opposed a hearing, and since it had the burden of proving, and the Commission the responsibility of finding, that the transaction was in the "public interest" and for a "lawful object," the application should have failed because the Commission, whether by hearing or not, certainly must assemble a record adequate to support whatever findings it makes. To put it differently, we say simply that, if the Commission should have considered the impact on competition and the section 5 issues, it should not have granted the application without a hearing, although it could have denied the application without a hearing. *Cf. White Motor Co.* v. *United States*, 372 U.S. 253, 264 (in section 7 cases "a trial rather than the use of the summary judgment is normally necessary"). But, as we have indicated, if the Commission should have considered those issues, the order must be set aside in any event.

Conclusion

For the reasons stated above, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CIVIL ACTION No. 9205

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS; AND SOUTHERN PACIFIC COMPANY, *Plaintiffs,*

and

RINGSBY TRUCK LINES, INC.; NAVAJO FREIGHT LINES, INC.; DENVER CHICAGO TRUCKING COMPANY, INC.; ILLINOIS-CALIFORNIA EXPRESS, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; TRANSCON LINES; WATSON-WILSON TRANSPORTATION SYSTEM, INC.; WESTERN GILLETTE, INC.; CONSOLIDATED COPPERSTATE LINES; AMERICAN TRUCKING ASSOCIATIONS, INC.; REGULAR COMMON CARRIER CONFERENCE; FREIGHT FORWARDERS INSTITUTE; TRANS-CONTINENTAL BUS SYSTEM, INC.; AMERICAN BUSLINES, INC.; ARKANSAS MOTOR COACHES LTD., INC.; BAYSHORE BUS LINES, INC.; CONTINENTAL BUS SYSTEM, INC.; CONTINENTAL CRESCENT LINES, INC.; CONTINENTAL PANHANDLE LINES, INC.; CONTINENTAL SOUTHERN LINES, INC.; CONTINENTAL TENNESSEE LINES, INC.; DENVER-COLORADO SPRINGS-PUEBLO MOTORWAY; DENVER-SALT LAKE-PACIFIC STAGES, INC.; CONTINENTAL PACIFIC LINES, INC.; MIDWEST BUSLINES, INC.; SMOKY MOUNTAIN STAGES, INC.; TENNESSEE TRAILWAYS, INC.; UNION BUS LINES, INC.; and MUSCATINE, DAVENPORT AND CLINTON BUS COMPANY, *Intervening Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

RAILWAY EXPRESS AGENCY, INCORPORATED, and THE GREYHOUND CORPORATION, *Intervening Defendants.*

* * * * * * *

Before BREITENSTEIN, Circuit Judge, and ARRAJ and CHILSON, District Judges.

BREITENSTEIN, Circuit Judge.

This suit concerns the validity of an order of the Interstate Commerce Commission authorizing the issuance of stock by Railway Express Agency, Incorporated (REA), for sale to The Greyhound Corporation.[1] Various carriers and associations protested the Commission action. The plaintiffs are five railroads, all of which are stockholders of REA. Twenty-nine motor carriers, or associations of motor carriers, have intervened as plaintiffs. REA and Greyhound have intervened on the side of the defendants. We have jurisdiction under 28 U.S.C. § 1336. A three-judge district court is required by 28 U.S.C. § 2325.

REA, Greyhound, and the plaintiff railroads are all subject to the Interstate Commerce Act (the Act). REA is a common carrier by express on railroads and a common carrier by motor vehicle. It competes with Greyhound in the transportation of property between points in all states of the United States, except Alaska and Hawaii.

REA filed an application under §§ 20a and 214 of the Act[2] for authority to issue 500,000 shares of its common stock to Greyhound at $20 per share upon certain terms and conditions. Various protests, none of which challenged the facts stated by the applicant, alleged that Greyhound was trying to get control of REA in violation of § 5 of the Act,[3] that the issuance of the stock would not conform to the standards of § 20a, and that an evidentiary hearing should be held. The United States Department of Justice intervened asserting that the Commission should act under § 11 of the Clayton Act[4] to determine if the proposed

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[1] The orders were entered in Finance Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* and in Finance Docket No. 23374, *Southern Pacific Co.* v. *Greyhound Corp. and Railway Express Agency, Inc.*

[2] 49 U.S.C. §§ 20a and 314.

[3] 49 U.S.C. § 5.

[4] 15 U.S.C. § 21.

transaction violated § 7 of that Act.[5] Southern Pacific Company, one of the protestants and a plaintiff herein, filed with the Commission a complaint against Greyhound and REA asserting that the transaction encompassed control or management of REA by Greyhound and requesting action by the Commission under § 5(7) of the Act to forbid the consummation of the proposal.

The Commission held no evidentiary hearing. Its March 15, 1965, order recited the background of the transaction, the corporate situation of REA, and the procedures which had been followed. It said that the filing of a § 5 application is "permissive and may not be required"; that an investigation of possible violations of § 5 of the Act and § 7 of the Clayton Act "would not be appropriate at this time"; and that a hearing was not necessary "for a determination of the application for authority to issue said stock under the provisions of sections 20a and 214." The Commission specifically found that the REA stock issue was lawful, compatible with the public interest, reasonably necessary, and consistent with its intended purpose. The complaint of the Southern Pacific under § 5(7) was dismissed and the stock issue was authorized. This action was then brought to set aside and vacate the order. The Commission has stayed the order until the completion of judicial review.

From 1929 to 1961 REA was operated on a non-profit basis and either leased facilities or used facilities owned by other carriers. In 1961 it changed to a profit-and-loss basis and embarked on a program of capital expenditures to acquire and modernize terminals and equipment. The financing of such program was difficult because of a short history of profitable operations and an unfavorable ratio of debt to equity. Before 1963 only railroads could be stockholders of REA. Although this requirement was then removed, the charter provision that all sales of outstanding shares are subject to a right of first refusal by the railroad shareholders was retained.

In February, 1964, Greyhound submitted a proposal to

[5] 15 U.S.C. § 18.

REA which in essence covered acquisition of control of REA by Greyhound subject to Commission approval. The offer was not accepted. Thereafter meetings of executives of the two companies produced a "Memorandum of Understanding" which outlined "potential savings or advantageous arrangements" which would result from the merger of the companies or the consolidation of certain activities. These included joint use of terminals, garages, communication facilities, and sales solicitation.

In July, 1964, Greyhound made a second offer which, with some modifications, was approved by the REA Board of Directors and stockholders.[6] The terms of the agreement appear in the resolution adopted by the REA Board. The important provisions are:

(1) Greyhound will acquire a 20% stock interest in REA through purchase, at $20 a share, of 500,000 shares of authorized but unissued stock not subject to the right of first refusal;

(2) Greyhound will have a 20% representation on the REA Board;[7]

(3) If the transaction is approved by the Commission and consummated, Greyhound, for a period of 60 days, will stand ready to purchase, at $20 a share, up to 1,000,000 shares of the outstanding REA stock, subject to the right of first refusal;

(4) The REA Board will seriously consider the sale of REA stock to the airlines and the public; and

(5) "The REA Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies,

[6] The stockholders approved by a vote of 1,654,572 shares for and 269,800 shares against. The plaintiffs herein own 211,762 shares.

[7] This is to be accomplished by amending the by-laws to increase the board membership from 23 to 25. The numbers of directors nominated by the various railroad districts remain constant but the at-large directors will be increased from 5 to 7.

improve service and increase public receptivity and patronage."

The main thrust of the plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing. Consideration of this issue requires an analysis of the statutes upon which reliance is placed.

The REA application was filed under §§ 20a and 214.[8] Section 20a(2) declares that a carrier shall not issue stock without Commission authorization. Section 20a(6) says: "The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority." Accordingly, on a § 20a(2) application the Commission has the discretion to determine whether a hearing shall be held.

Section 5(2)(a)(i) covers, among other things, acquisitions of control of one carrier by another through stock ownership and makes such acquisition lawful if approved by the Commission. Section 5(2)(b) requires a carrier seeking authority for such a transaction to present an application to the Commission. Section 5(4) makes it unlawful for a person to enter into a transaction within the scope of § 5(2)(a) without compliance therewith. Section 5(7) authorizes but does not require the Commission on complaint or on its own initiative, but after notice and hearing, to investigate and determine whether any person is violating § 5(4). Here again the holding of a hearing is discretionary with the Commission.

Section 7 of the Clayton Act[9] prohibits a corporation engaged in commerce from directly or indirectly acquiring in whole or part the stock of another corporation engaged in commerce "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Section 11 of the same act[10] imposes on the Commission the duty of enforcing compliance with § 7

[8] Section 214 makes § 20a applicable to motor carriers.

[9] 15 U.S.C. § 18.

[10] 15 U.S.C. § 21.

where, as here, the parties concerned are common carriers subject to the Interstate Commerce Act. Section 5(11) of the latter act says that the authority conferred thereunder shall be exclusive and plenary and that any carriers participating in transactions authorized or approved under the section "are relieved from the operation of the antitrust laws."

The argument is that approval of the stock issuance may not be given without determination, after hearing, of the question of control arising under § 5 of the Act and of the question of the competitive consequences arising under § 7 of the Clayton Act. Although these are somewhat related we shall consider them separately.

The § 5 question is raised in two ways, by the protests filed to the § 20a application and by the complaint of Southern Pacific under § 5(7). These pleadings do not controvert any facts put of record by REA and do not allege any additional factual matters. The pleaded conclusions add nothing. The briefs suggest that cross-examination of the REA and Greyhound officials who participated in the inter-company negotiations may reveal that the true plan contemplates control of REA by Greyhound but no solid basis is shown for the suggestion.

Control is "an issue of fact to be determined by the special circumstances of each case."[11] The difficulty here is that important and decisive facts are presently unknown. The transaction contemplates the issuance to Greyhound of 500,000 shares out of a total authorization of 2,576,000 shares. The offer of Greyhound to purchase an additional 1,000,000 shares from the present shareholders is subject to such shareholders' right of first refusal. This means that when Greyhound proposes the purchase of any such stock, or a block thereof, all shareholders, including the plaintiffs, may acquire that stock themselves. In its order the Commission noted that Greyhound had been told by railroad representatives, including representatives of the plaintiff railroads, "that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad share-

[11] *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145.

holders." If Greyhound acquired the 1,000,000 shares it would own over 50% of the REA stock. If the dissident railroads acquired the same amount the shoe would be on the other foot as they would then own nearly 50%.

REA has no executive committee and is governed by a 23-man board of directors. Of these 7, 6, and 5 are respectively nominated by the eastern, western, and southern railroad districts and 5 are chosen at large. The transaction contemplates an increase in the board to 25 members with 5 of the at-large members nominated by Greyhound. Any further change in the board requires the two-thirds vote necessary to amend the by-laws. Even if Greyhound acquires a total of 1,500,000 shares the possibility of a change in the make-up of the board would require the cooperation of other shareholders.

The plaintiffs emphasize that portion of the agreement requiring the REA Board "to consider seriously and work toward" an arrangement for consolidation and cooperation "in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage." This commits REA only to serious consideration. The effect will depend on the outcome of the offer to purchase the 1,000,000 shares and the subsequent actions of the REA Board.

The briefs of the parties devote much space to the Breswick litigation.[12] There the district court first set aside Commission approval of a stock issue on jurisdictional grounds. The Supreme Court reversed noting that the matter of a hearing was governed by § 20a(6).[13] The case was remanded for consideration of whether the stock issue violated the Interstate Commerce Act.[14] The district court after commenting that under § 20a the Commission was not required as a matter of law to hold an evidentiary hearing

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[12] *Breswick & Co.* v. *United States*, S.D.N.Y., 138 F.Supp. 123, reversed *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, decision on remand *Breswick & Co.* v. *United States*, S.D.N.Y., 156 F.Supp. 227, reversed *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415, decision on remand *Breswick & Co.* v. *United States*, S.D.N.Y., 160 F.Supp. 754.

[13] 353 U.S. 151, 175.

[14] Ibid.

went on to say that the Commission could not approve the issuance of stock without determining the control question which had been raised.[15] The Supreme Court again reversed saying in a short per curiam that the only question open on the remand was whether the transaction violated the Act.[16] Our reading of the decisions convinces us that the Supreme Court has left open the question of whether, when a control question is raised, it must be decided in advance of a § 20a approval of the issuance of stock. In our view a categorical answer cannot be given. In some instances consideration of the public interest may require such determination and in other instances it may not. Generally, the question of control must be answered on a case by case basis. Here we have a situation where the Commission has found that the answer cannot be reached on the basis of the presently known facts. Developments subsequent to the stock issuance must be awaited.

The intervening plaintiffs argue that the Commission breached its statutory duty in refusing to institute a proceeding to determine whether the transaction violated § 7 of the Clayton Act. This point was raised before the Commission by the Department of Justice which has not pursued the matter before us. In the interval between Commission action and court hearing the Supreme Court decided Seaboard Air Line R.R. v. United States, 382 U.S. 154. In that case two railroads filed with the Commission an application for authority to merge. The Commission approved subject to certain conditions. The district court reversed, concluding that the Commission's analysis of the competitive effects of the merger was fatally defective because the Commission had not determined whether the merger violated § 7 of the Clayton Act. The Supreme Court reversed the district court, holding on the authority of McLean Trucking Co. v. United States, 321 U.S. 67, 80, 85-87, and Minneapolis & St. Louis Ry. v. United States, 361 U.S. 173, 186, that the Commission may approve a merger notwithstanding a potential violation of the antitrust laws if it makes adequate findings, after weighing the effects of

[15] 156 F.Supp. 227, 230.

[16] 355 U.S. 416.

the curtailment of competition against the advantages of improved service, that the merger would be consistent with the public interest under § 5(2)(b). We see no reason why the principles announced in Seaboard as applicable to a § 5 merger proceeding do not apply to a § 20a stock issuance proceeding. We believe that the Commission has followed those principles. It has not shut its eyes to the competitive effects. All it has done is to say that in the circumstances presented the public interest requires the issuance of the stock and that determination of the competitive effects will be appropriate for consideration after the chain of events started by the stock issuance is ascertainable rather than conjectural.

Whether the approach is under § 5 of the Interstate Commerce Act or § 7 of the Clayton Act the outcome is the same. The Commission has the responsibility of giving effect to the national transportation policy. In the performance of that responsibility the Commission has decided that the REA-Greyhound transaction meets the standards fixed by § 20a(2) and that determination of the control and competition questions must await developments subsequent to the issuance of the 500,000 shares of REA stock to Greyhound. We are convinced that the Commission took the proper course. In Denver Union Stock Yard Co. v. Producers Livestock Marketing Assoc., 356 U.S. 282, 287, the Supreme Court repeated the observation first made in United States v. Storer Broadcasting Co., 351 U.S. 192, 205, that Congress did not intend an agency "to waste time on applications that do not state a valid basis for a hearing." The principle applies here. Until the facts are developed by occurrences after the stock issuance, hearings on control and competitive effects are no more than an exercise in futility. In the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its discretionary powers.[17] The Commission did not decide, and we do not decide, any questions relating to control or competition. They are for the future.

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[17] *See United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 536.

Finally, the intervening plaintiffs argue that the order must fall because the Commission has not made the requisite findings and has not stated the basis of its decision.[18] We do not agree. The facts are not disputed. The Commission decided that it was not appropriate to resolve control and competition questions at this time and that the § 20a(2) standards for approval of stock issuance had been met. In our opinion the Commission order is clear and understandable and presents an adequate basis for judicial review.

The clerk shall forthwith enter judgment for the defendants dismissing the action.

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[18] *See Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 93-95, 332 U.S. 194, 196-197.

APPENDIX B

Service date:
March 16, 1965

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 15th day of March, A.D. 1965.

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK

Finance Docket No. 23374

SOUTHERN PACIFIC CO.

v.

GREYHOUND CORP. AND RAILWAY EXPRESS AGENCY, INC.

It appearing, That Railway Express Agency, Incorporated, by an application filed October 7, 1964, in Finance Docket No. 23324, as last supplemented November 17, 1964, seeks authority under sections 20a and 214 of the Interstate Commerce Act to issue 500,000 shares of common stock, par value $1 per share, to be sold to The Greyhound Corporation (Greyhound) at a price of $20 per share; that interested parties listed in the appendix hereto have been permitted to intervene; and that Finance Board No. 2 has certified the application to us for determination;

It further appearing, That the several companies named in section II(b) of the appendix have filed a petition seeking an order requiring Greyhound to file an application under section 5 of the act, and requesting consolidation and hearing of such application on a common record with the application for authority to issue said stock;

It further appearing, That the United States Department of Justice has filed a petition for leave to intervene and for consolidation of the application to issue securities with a proceeding to determine the lawfulness of the proposed transaction under section 7 of the Clayton Act, and for oral

hearing and a prehearing conference for the purpose of formulating the issues;

It further appearing, That by complaint, served November 13, 1964, in Finance Docket No. 23374, Southern Pacific Company requests us to invoke the provisions of section 5 (7) of the act, and after hearing and investigation, to require applicant and Greyhound to cease and desist from consummating the proposed transaction; that by motions filed December 2 and 3, 1964, defendants seek dismissal of the complaint; and that defendants have answered the complaint, and complainant has replied to the motions;

It further appearing, That applicant has replied to all protests and petitions, urging primarily that the application be approved without further proceedings;

It further appearing, That the filing of an application under section 5 of the act is permissive and may not be required by us, see *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122(127); that an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time; and that a hearing is not necessary for a determination of the application for authority to issue said stock under the provisions of sections 20a and 214.

It further appearing, That applicant's charter authorizes it to issue 2,576,000 shares of common stock, of which 1,999,188 shares are outstanding, owned by some 60 railroads; that said stock is not required to be held only by railroad corporations; that outstanding shares are subject to a right of first refusal by railroad shareholders; and that the shares proposed to be issued to Greyhound will not be subject to such right;

It further appearing, That after the proposed sale to Greyhound of 500,000 shares of applicant's authorized but unissued common stock at $20 per share, Greyhound will offer to purchase from railroad shareholders of applicant up to 1,000,000 shares of outstanding common stock at the same price; and that to comply with terms and conditions of the offer, applicant's board of directors, at a meeting held September 1, 1964, adopted resolutions declaring intentions

(a) to refinance, if necessary, $27,637,054 of outstanding 5-per-cent notes, issued originally to applicant's stockholders, or otherwise to secure waiver or cancellation of a prohibition against payment of dividends; (b) to consider seriously and work toward a long-term agreement between applicant and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage; and (c) to consider seriously at a later time the sale of some stock to airlines and/or the general public if and when conditions appear favorable to the best interests of applicant as a company;

It further appearing, That at a special meeting of applicant's stockholders held October 1, 1964, resolutions approving the proposed stock issue and amending applicant's by-laws to increase the membership of the board of directors from 23 to 25 and to increase the number of directors at large from 5 to 7, were adopted by a vote of 1,654,572 shares for and 269,880 shares opposed to the resolutions; that railroad stockholders have the right to nominate 18 members; that 7 may be nominated by railroads of the eastern district and 6 and 5 may be nominated by western and southern district railroads, respectively; that 5 of the 7 at-large directors may be nominated by bus company holders of at least 20 percent of the stock issued and outstanding; that an affirmative vote of two-thirds of the stock issued and outstanding is required to amend the by-laws in respect of the number of directors nominated by districts; and that for any alteration in the number of directors or in the method of nominating directors at large, the affirmative two-thirds vote shall include a majority of the issued and outstanding stock held by bus company stockholders as aforesaid;

It further appearing, That applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the

amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000;

It further appearing, That interveners' opposition is directed to the possibility of control of applicant by Greyhound, through the purchase of the proposed stock issue or presently outstanding shares or otherwise, and to the anticipated combination and correlation of certain of their facilities and services;

It further appearing, That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York C. & St. L.R. Co. Control,* 295 I.C.C. 703 (714);

It further appearing, That if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition; and it appearing that Greyhound has acknowledged the requirements of section 5 in this regard and has stated that it will file a timely application; and that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the

action which may be taken on any such application under section 5; and

It further appearing, and the said Division so finds, that the proposed issue by Railway Express Agency, Incorporated, of not exceeding 500,000 shares of common stock of the par value of $1 each, as aforesaid, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company and a common carrier by motor vehicle, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

It is ordered, That the United States Department of Justice be, and it is hereby, permitted to intervene.

It is further ordered, That in all other respects, the petitions of interveners for hearing and other proceedings be, and they are hereby, denied.

It is further ordered, That the complaint in Finance Docket No. 23374 be, and it is hereby dismissed.

It is further ordered, That Railway Express Agency, Incorporated, be, and it is hereby, authorized to issue not exceeding 500,000 shares of common stock of the par value of $1 each, to be sold to a non-railroad corporation at a price of not less than $20 per share.

It is further ordered, That this order shall become effective 35 days from the date it is served.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission.

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, respecting applications filed under sections 20a and 214 of the said act (49 CFR 56.6).

It is further ordered, That the applicant shall submit for the consideration of this Commission three copies of the

journal entries required to record the transaction, and nothing herein is to be construed as approval of the proposed accounting; and

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States.

By the Commission, Division 3.

BERTHA F. ARMES,
Acting Secretary.

(Seal.)

APPENDIX C

STATUTES

Clayton Act, section 7, 38 Stat. 731, as amended, 15 U.S.C. 18:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or

short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

* * * * * * *

Clayton Act, section 11, 38 Stat. 734, as amended, 15 U.S.C. 21:

(a) Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Fedral Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in

which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

* * * * * * *

Clayton Act, section 16, 38 Stat. 737, 15 U.S.C. 26:

* * * * * * *

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 2, 3, 7 and 8 of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. . . .

* * * * * * *

Interstate Commerce Act, section 5, 25 Stat. 380, as amended, 49 U.S.C. 5:

* * * * * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicles are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it neces-

sary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposd transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad

or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to the public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

* * * * * * *

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more

carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)-(10), 304(a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a(2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a, and 314 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

• • • • • • •

(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

• • • • • • •

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in the common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

* * * * * * *

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

* * * * * * *

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this

section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

* * * * * * *

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and

exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

* * * * * * *

(13) As used in paragraphs (2)-(12) of this section, inclusive, the term "carrier" means a carrier by railroad and an express company and a sleeping-car company, subject to this chapter; and a motor carrier subject to chapter 8 of this title; and a water carrier subject to chapter 12 of this title.

* * * * * * *

Interstate Commerce Act, section 20a, 41 Stat. 494, as amended, 49 U.S.C. 20a:

* * * * * * *

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * * * * *

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order mod-

ify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

• • • • • • •

Interstate Commerce Act, section 214, 49 Stat. 557, as amended, 49 U.S.C. 314:

Common or contract carriers by motor vehicle corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs (2) to (11), inclusive, of section 20a of this title (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the value of capital stock or principal amount of other securities to be issued, together with the value of capital stock and principal amount of other securities then outstanding, does not exceed $1,000,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than $200,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of capital stock having no par value, the value thereof for the purpose of this section shall be the fair market value as of the date of its issue; and in the case of capital stock having par value, the value for the purpose of this section shall be the fair market value as of the date of its issue, or the par value, whichever is the greater.

Administrative Procedure Act, section 8(b), 60 Stat. 242, 5 U.S.C. 1007(b):

Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. . . .

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 9205

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, et al., *Plaintiffs,*

and

RINGSBY TRUCK LINES, INC. et al., *Intervening Plaintiffs,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

RAILWAY EXPRESS AGENCY, INCORPORATED, AND THE GREYHOUND CORPORATION, *Intervening Defendants.*

JUDGMENT OF DISMISSAL

PURSUANT to the Memorandum Opinion filed in the above-entitled action directing the Clerk to forthwith enter a judgment dismissing the action, it is, therefore

ORDERED that the action and plaintiffs' complaint, and the complaints of the intervening plaintiffs be, and the same are hereby, dismissed.

DATED at Denver, Colorado, this 11th day of April, 1966.

BY ORDER OF THE COURT:

G. WALTER BOWMAN,
Clerk.

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FILED
AUG 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLEES', RAILWAY EXPRESS AGENCY INCORPORATED AND THE GREYHOUND CORPORATION, MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellees*.

No. 305

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLEES', RAILWAY EXPRESS AGENCY INCORPORATED AND THE GREYHOUND CORPORATION, MOTION TO AFFIRM

Appellees, Railway Expressway Agency, Incorporated (REA) and the Greyhound Corporation (Greyhound), move pursuant to Paragraph 1(c) of Rule 16 of the Revised Rules of this Court that the judgment of the district court be affirmed.* The district court held that

> "until the facts are developed by occurrences after the stock issue [by REA to Greyhound], hearings on control and competitive effects are no more than an exercise in futility. In the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its dis-

*On July 28, 1966, Mr. Justice White signed an order extending the time of appellees to file such a motion to and including August 29, 1966.

> cretionary powers. The Commission did not decide, and we do not decide, any questions relating to control or competition. They are for the future." (Appendix A to Jurisdictional Statement, p. 39.)

That decision rests upon a unique set of absolutely undisputed facts and affirms what is in effect merely a procedural decision by the Interstate Commerce Commission (the Commission). The sole question presented is so clearly insubstantial as not to need further argument.

QUESTION PRESENTED

Whether the Commission properly acted within its discretion under Section 20a of the Interstate Commerce Act, in authorizing REA to sell twenty per cent of its stock to The Greyhound Corporation (Greyhound), without first resolving alleged questions of control of REA by Greyhound for the sixty days following such sale and alleged questions of the anti-competitive effect of such control during that period where the undisputed facts show, (1) that the present railroad stockholders of REA are and will remain in complete control of REA for that period, and (2) that the five appellant railroads may, at the expiration of the sixty day period, themselves own about fifty per cent of REA's stock and hence be in control of REA, and where the Commission expressly reserved to itself and to all parties the right to challenge the acquisition of any of REA's stock by any person on any grounds when the facts relating to any real issues of control and competitive effect become known sixty days after the sale to Greyhound is completed.

STATUTES INVOLVED

In addition to the statutes cited by appellants, the statutes involved include Section 20a(6) of the Interstate Commerce Act which is set forth in Appendix A hereto.

STATEMENT

REA, which conducts an express transportation business throughout the United States and in Puerto Rico and Canada, is entirely owned and controlled by sixty major United States railroads. (Ltr. dated October 12, 1964, from REA to the Commission, p. 3; REA's Return to Information Request, pp. 1-2.) Such control is maintained and exercised through two means, neither of which will be affected by the sale of stock to Greyhound.

In 1963 REA's then outstanding one thousand shares of stock were reclassified into 2,076,000 shares, all subject to the right of first refusal on the part of each of REA's stockholders. At the same time, 500,000 additional shares were authorized which are not subject to the right of first refusal. (REA's Return to Information Request, p. 2.) Thus, each of REA's present stockholders has a right of first refusal with respect to all of the presently outstanding stock. The only stock not subject to that right is the special block of 500,000 authorized but unissued shares which will be sold to Greyhound. (REA's Return to Information Request, pp.1-2.) Obviously, the right of first refusal gives to each of REA's present stockholders (including the five appellant railroads) the power to block any attempt by any outsider such as Greyhound to obtain any REA stock other than the special unissued block of 500,000 shares. The five appellant railroads have made clear their intention to prevent the sale of any of the presently outstanding stock to

Greyhound by exercising their rights of first refusal. Order of March 15, 1965, p. 2; Appendix B to Jurisdictional Statements, p. 44.)

A second factor which protects the present stockholders' complete control of REA is the unique structure of REA's board of directors. Under its By-laws, REA's stockholders are divided into four groups, three of which consist of railroad stockholders who operate in the Eastern, Western and Southern Districts of the United States and who have the right to and do elect seven, six and five directors respectively to REA's twenty-five man Board. (REA By-laws, Art. II, § 8.) The remainder of the Board is made up of seven directors-at-large, five of which will be elected by Greyhound when the sale of the 500,000 shares of stock is consummated. The By-law provisions governing the method of electing directors may not be changed without an affirmative two-thirds vote of REA's stock. (REA By-laws, Art. II, § 2, Art. XI*; REA Return to Information Request, pp. 10-11.)

Prior to July 1, 1961, REA was operated on a non-profit basis, with its stockholders rendering services to it and sharing any profit or loss from its operations. On that date, REA was placed on a normal profit and loss basis, which created both the incentive and the necessity to conduct an efficient and economical operation. (REA's Application, p. 6; Ltr. dated October 12, 1964, from REA to the Commission, p. 3.) Because of the historical method of operation, REA's retained earnings do not provide sufficient funds to permit it to complete long deferred capital improvements which are essential if it is to compete effectively. REA must obtain outside debt financing. In order to do so, it must increase its equity base sufficiently to make it attractive to lenders. (Order of March 15, 1965, p. 2; Appendix B to Jurisdictional Statement, p. 43.)

---

*REA's By-laws were printed as Appendix I to REA's brief in the district court.

In 1964, Greyhound provided the opportunity to obtain the needed equity. Initially, Greyhound proposed to acquire a controlling interest, ranging up to one hundred per cent of the outstanding stock. However, each attempt by Greyhound to obtain any stock other than the unrestricted 500,000 shares was blocked by certain REA stockholders, including appellant railroads who own in the aggregate nearly ten per cent of REA's stock. (REA's Return to Information Request, pp. 1-4, Annex A.)

Hence, the present proposal was evolved. Greyhound will purchase the unrestricted 500,000 shares of REA stock at a price of twenty dollars per share and will be allowed to nominate and elect five of the directors-at-large. Because of a provision inserted in the proposal to satisfy the desire of certain REA stockholders to have a market for their shares, Greyhound must, immediately following the consummation of that sale, make a tender offer to REA's stockholders, good for sixty days, to purchase one million of the presently outstanding shares for twenty dollars per share. (*Id.* at pp. 2-4, Annex A(6), p. 3) However, the appellant railroads have told Greyhound, "that it would not acquire one additional share under the offer to purchase up to 1,000,000 shares subject to the right of first refusal by such railroad shareholders". (Order of March 15, 1965, p. 2; Appendix B to Jurisdictional Statement, p. 44.) Thus, although as a result of the tender offer Greyhound's holdings of REA stock may increase, the more likely outcome is that one or more of REA's present stockholders (including appellant railroads) will purchase any tendered stock, leaving Greyhound's holdings unchanged. Without knowing the outcome of the tender offer, it is impossible to predict the ultimate relationship of Greyhound and the various groups of railroad stockholders to REA.

As a result of the present proposal, REA will receive ten million dollars which the Commission found it "urgently

needs . . . in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level . . . ." (Order of March 15, 1965, p. 2; Appendix B to Jurisdictional Statement, p. 43.)

None of the foregoing facts were ever challenged in any way by any of the parties.

Confronted with these uncontroverted facts, the Commission had a choice of two possible procedures.* Having made an extensive investigation (*e.g.*, see generally REA's Return to Information Request) of the proposal as required by Section 20a(2), the Commission could approve the issuance of the 500,000 shares, reserving the question of a hearing on the alleged control and competition problems, if any, until the tender offer had been concluded and the nature and extent of those problems, if any, were known. Alternatively, the Commission could have ordered that hearings be held under Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act before the 500,000 shares were issued.

If the Commission had chosen the second alternative, as appellants urge it was absolutely required to do, it then would have been faced with extensive hearings, involving an expenditure of substantial administrative time and effort. In such a proceeding the only issues the Commission could have determined would have been what Greyhound's relationship to REA would be for the sixty days during which the tender offer was outstanding (clearly minimal in view of the absolute control exercised by the railroads) and, perhaps, whether such relationship for that period of time would

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*Appellants' suggestion that the Commission might have simply told REA and Greyhound somehow to reform a contract which took almost a year to negotiate over the opposition of the railroad appellants is both unrealistic and somewhat disingenous. Obviously neither REA nor the Commission, which found that REA urgently needed the money from Greyhound to perform its service to the public, had any assurance, or indeed any reason to believe, that the contract could be renegotiated.

be consistent with the public interest. If the Commission had followed that procedure and approved the relationship for sixty days, it would then have been necessary to hold a second set of hearings at the end of that period to determine the effect of whatever shift in REA stock ownership takes place as a result of the tender offer.

The Commission, properly we submit, selected the first and more reasonable alternative. In its order the Commission made perfectly clear "that nothing herein shall be construed as a determination of any matter under any section of the act, except Sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5". (Order of March 15, 1965, p. 3; Jurisdictional Statement, pp. 44-45.) Thus, the Commission made clear that consideration of any alleged problems relating to control or the effect on competition was reserved.

The district court held, correctly we believe, that the procedure selected by the Commission was within its discretion and that the procedure which appellants claim is absolutely required would have been "an exercise in futility". (Appendix A to Jurisdictional Statement, p. 39.)

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

The only question presented by this appeal is one of procedural timing. The Commission approved REA's application for authority to issue stock and deferred consideration of any problems of control or effect upon competition until the facts with respect to those issues are known. Appellants contend that the Commission did not have discretion to make that procedural decision. Although appellants never openly admit it, they are actually contending that the Commission must be required to hold extensive hearings to ascer-

tain what the relations between Greyhound and REA will be during the sixty days of the tender offer. Appellants have ample reason for avoiding a clear statement of that simple question in the Jurisdictional Statement. That question is so obviously insubstantial that no further argument is required.

Appellants present five questions although they seem to discuss six. The first three questions presented and the first four discussed relate to appellants' claim that the Commission must be forced to consider the alleged control question and the alleged effect upon competition now, before the facts with respect to those issues can be known.

Appellants suggest that unless the Commission is required to consider those questions now they will never be considered. That is obviously not so. It ignores the fact that Greyhound has represented to the Commission that if the time arrives when it appears that there is any possibility of Greyhound acquiring control of REA, Greyhound will file the necessary application for authority to acquire such control under Section 5. (Ltr. dated December 3, 1964, from Greyhound to the Commission, p. 2.) Appellants' suggestion also ignores the specific reservation of power by the Commission in its order. The Commission dismissed appellants' complaint under Section 5(7) of the Interstate Commerce Act on the ground that such a proceeding would not be appropriate until all the facts became known. Once the transactions resulting from the tender offer are completed and the facts are known, appellants may then file a complaint under Section 5(7) if in their view Greyhound or the Commission itself has failed to take appropriate action. If the Commission were to abuse its discretion in dismissing such a complaint, appellants would be entitled to a full review and complete relief from any federal district court.

The simple fact is that nothing has been decided with respect to the control or competition issues by the Commission or by the district court and, hence, no question is presented with respect to such issues.

However, a brief comment on some of the factual allegations in the Jurisdictional Statement may be helpful. Since appellants did not present any facts to the Commission with respect to the alleged control and competition problems, they feel free to conjure up a series of statements regarding the degree of control, relevant market, anti-competitive effect, etc. Those allegations are without foundation. For example, appellants assert that the relevant market consists of REA, with eighty-eight per cent of the market, Greyhound, with seven per cent, and "all other motor carriers of passenger combined" which "add most of the balance" (Jurisdictional Statement, p. 15). One is led to wonder why, if such facts are accurate, all of the major truck lines, freight forwarders and five major railroads are prosecuting this appeal. Surely, those carriers are not acting solely to protect the interests of the motor bus carriers. Moreover, as the hearings and attendant publicity with respect to the Post Office Department's proposal in H. R. 14904 to change the weight and size limits on parcel post make perfectly clear, the largest and most important competitor of REA is the United States Government.* Similarly, appellants distort the language of a document prepared by an officer of REA and an officer of Greyhound relating to possible arrangements between the two carriers which might prove economical.** That docu-

*REA stated before the Commission that it competes with Greyhound only for the business of shipping small packages of such size, weight, volume and character that they can be transported on passenger vehicles. Of this business, Greyhound handles substantially less than one per cent and REA handles two per cent of the United States total, the remaining ninety-seven per cent being handled by freight forwarders, trucks, railroads and the United States Post Office. (REA's Answer to Southern Pacific's Complaint, p. 2) Those statements were not controverted by appellants or any other parties.

**In their purported summarization of this memorandum (Jurisdictional Statement, p. 7, Note 8.), appellants twist its meaning by, for example, substituting the verb "would" where the memorandum simply says "could". Thus, the memorandum suggest that Greyhound

ment, which was presented to the Commission by REA, is nothing more than a listing of suggestions for consideration. Neither carrier is obligated in any way to follow the suggestions. As the district court found, the effect of that document "will depend on the outcome of the offer to purchase the one million shares and the subsequent actions of the REA Board." (Appendix A to Jurisdictional Statement, p. 37.)

The remaining two issues presented in the Jurisdictional Statement are purely makeweight. The order of the Commission was not in any respect ambiguous. The district court read it without difficulty. It is brief and to the point and any doubts as to its clarity or requisite specificity may be resolved by a quick reading.

Appellants have now largely abandoned their position below that they were entitled as a matter of constitutional due process to a hearing with respect to their positions before the Commission. Appellants' allegations there were entirely conclusory and neither controverted facts set forth by REA and Greyhound nor raised any new facts. To be sure, they drew different conclusions from the facts. However, a hearing is not necessary to consider varying conclusions. Moreover, the argument that a hearing was required flies in the face of Section 20a(6) which states that the Commission shall hold a hearing only "if it sees fit" and not otherwise. The Commission was required to, by Section

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"could absorb" service and maintenance work on REA equipment in certain locations (REA Return to Questionnaire, Annex 6, p. 2.); appellants' "summarization" states that Greyhound "would take over" such work (Note 8, ¶ 2). Also, the memorandum indicates that Greyhound's solicitation force "could be eliminated" and the service performed by REA (Annex G, p. 3); appellants "summarize" that statement by asserting that the two companies "would use" the same forces (Note 8, ¶ 4). Similarly, the memorandum suggests only what would happen "*if* REA would perform the terminal services, other than loading and unloading of buses . . ." (Annex G, p. 1, emphasis added); appellants' quotation of that statement carefully omits the "if" (Note 8, ¶ 4).

20a(2), and did conduct an elaborate investigation of the facts, but after that investigation the Commission concluded that a hearing was not necessary. Certainly, no hearing was required.

CONCLUSION

There being no substantial question requiring further argument, the judgment of the Court below should be affirmed.

August 29, 1966.

Respectfully submitted,

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APPENDIX A

Interstate Commerce Act, Section 20a, 41 Stat. 494, as amended, 49 U. S. C. § 20a:

". . . .

"(6) Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 40) dismissing appellant's suit to set aside an order (J.S. 41–46) of the Interstate Commerce Commission. The order granted the application of the Railway Express Agency, Inc. ("REA"), under Sections 20a and 214 of the Interstate Commerce Act (49 U.S.C. 20a, 314) to issue 500,000 shares (or 20%) of its common stock to the Greyhound Corporation ("Greyhound").

REA is a common carrier by express on railroads and a common carrier by motor vehicle. Greyhound operates a nationwide passenger bus system and, like other bus companies, also carries some express shipments.

REA is entirely owned and controlled by sixty major railroads (including the five railroad appellants herein). Until 1964 it was governed by a 23-member board of directors, of which 18 were elected by the railroad stockholders grouped into three regional districts.[1] The remaining 5 were elected at large. The right to nominate a specific number of directors can only be changed by a vote of two-thirds of the outstanding stock. From 1929 to 1961 REA was operated on a non-profit basis, and its profits or losses were shared by the railroad stockholders. In 1961 it changed to a profit-and-loss basis and began to acquire facilities and equipment, which had previously been leased or obtained from other carriers. In 1963 REA removed from its charter the provision limiting stock ownership to railroad corporations but preserved to its railroad stockholders a right of first refusal on the sale of all outstanding stock (J.S. 42). The composition of the board of directors was left unchanged.

REA has experienced great difficulties in financing its new program of capital improvements. Those difficulties are principally attributable to REA's short

[1] The stockholdings and right to board representation of the three districts are as follows: Eastern District, 1,085,748 shares and 7 directors; Western District, 633,180 shares and 6 directors; and Southern District, 280,260 shares and 5 directors.

history of profitable operations and its unfavorable ratio of debt to equity (J.S. 33, 43). In 1964, Greyhound submitted to REA an offer to acquire control of REA through purchase of 67 percent of REA's stock, subject to Commission approval. As part of that offer, Greyhound proposed to finance its pro rata share of REA's capital requirements. Greyhound's offer, however, was contingent upon the waiver by all present stockholders of their right of first refusal, and was not accepted (J.S. 33–34).

Thereafter, REA and Greyhound executives began exploring potential savings and advantages which might be achieved by correlating or combining certain activities of the two corporations, including joint use of terminals, garages, communication facilities, and sales solicitation forces. As an incentive to pursue these possibilities, Greyhound desired at least a 20 percent equity interest in REA (J.S. 8, 9, 34).

From these discussions emerged an agreement, approved by REA's board of directors and by its stockholders,[2] which contemplated giving Greyhound a voice in REA affairs and an interest in its stock. The agreement provided that (1) Greyhound would acquire a 20 percent stock interest in REA through purchase of 500,000 shares of authorized but unissued stock (which is not subject to the railroad stockholders' right of first refusal); (2) REA's board of directors would be increased from 23 to 25 and Greyhound would name five members; (3) upon consummation of the initial stock sale, Greyhound would offer, for a

[2] The stockholder vote was 1,654,572 shares for the agreement, and 269,880 shares against it (J.S. 43).

period of 60 days, to purchase at $20 per share an additional one million shares of the outstanding REA common stock; (4) REA's board would declare by resolution "the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage"; and (5) REA would seriously consider the sale of its stock to airlines and to the public (J.S. 34).

Pursuant to that agreement, on October 7, 1964, REA applied to the Commission for authorization under 49 U.S.C. 20a to issue 500,000 shares to Greyhound (J.S. 41). Detailed factual data concerning the proposed transaction were set out in the application and in two additional responses required by the Commission. Various petitions and complaints were filed by appellants herein, all generally alleging that the application constituted an attempt by Greyhound to obtain control of REA, and requesting a hearing under Section 5 of the Interstate Commerce Act. In addition, the Department of Justice filed a petition urging the Commission to exercise its powers under Section 11 of the Clayton Act by conducting an investigation into the possible anti-competitive effects under Section 7 of the Clayton Act. None of the intervenors challenged the accuracy of the facts supplied by REA.

In response to the intervenors' petitions, REA urged that the evidence conclusively established that

the proposed stock issuance meets the standards of Section 20a, and that the questions of control and effect upon competition are premature and should be postponed until the results of Greyhound's 60-day offer are known. In addition, Greyhound filed a statement in which it denied that the stock acquisition, in these circumstances, raised any issue of control, and asserted that: "In the event that Greyhound should subsequently acquire any additional stock interest which would even approach a position of control, Greyhound would file an appropriate application under Section 5 of the Interstate Commerce Act" (see J.S. 44).

With respect to the intervenors' petitions, the Commission found that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time; and that a hearing is not necessary for a determination of the application for authority to issue [the] stock under the provisions of sections 20a and 214" (J.S. 42).

With respect to REA's application, the Commission found that REA urgently needs the $10,000,000 to be realized through the stock issue, that it is handicapped in borrowing capital funds because of its unfavorable debt-equity ratio, that the stock issue would improve the ratio while reducing the need for future borrowing, and that the sale price is fair and reasonable (J.S. 43–44). Cautioning that nothing in its order "shall be construed as a determination of any matter

under any section of the act, except sections 20a and 214" (J.S. 44), the Commission concluded that the stock issue

> * * * (a) is for a lawful object within [REA's] corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company and a common carrier by motor vehicle, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose * * *. [J.S. 45.]

Petitions for reconsideration were filed by all appellants herein. The Department of Justice, which alone had raised the question of a possible lessening of competition under Section 7 of the Clayton Act, did not petition for reconsideration, and the Clayton Act issue was not urged in any of the petitions filed by the other parties. Reconsideration was denied by the Commission.

On appeal, the three-judge district court sustained the Commission's order, noting that "until the facts are developed by occurrences after the stock issuance, hearings on control and competitive effects are no more than an exercise in futility" (J.S. 39). The court specifically stated: "The Commission did not decide, and we do not decide, any questions relating to control competition They are for the future" (*ibid*).

ARGUMENT

Under Section 20a of the Interstate Commerce Act, the Commission is given substantial regulatory powers

over the financial structure of carriers subject to the Commission's jurisdiction. In particular, Section 20a makes the issuance of "any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier" (other than short-term notes) and the assumption of any obligation or liability by the carrier subject to the prior approval of the Commission. It seems evident that the dominant purpose of these provisions is the maintenance of "a sound structure for support of railroad credit to aid in developing a national transportation system" and, indirectly, the protection of "the investing public against faulty or dishonest financing which could result in dissipation of railroad resources" (*Chicago South Shore and S. Bend R.R.* v. *United States,* 221 F. Supp. 106, 108 (N.D. Ind.)). Section 20a is thus to be read against the dramatic history of the improvident and fraudulent transactions in railroad securities which marked the latter half of the nineteenth century.[3]

It was in terms of these financial considerations that the Commission scrutinized REA's application to issue 500,000 shares of its common stock. Finding that REA urgently needed the equity capital to be realized by the sale and that the sale price was fair and reasonable, the Commission authorized the issue. Appellants do not suggest that in this financial aspect the Commission's order was unsupported by the record or otherwise improper. What appellants do

[3] See Beard & Beard, *The Rise of American Civilization* (1930 ed.) II, 198-204; Morison & Commager, *The Growth of the American Republic* (1950 ed.) II, 114; Sharfman, *The Interstate Commerce Commission* (1931) I, 190.

urge is (1) that the Commission erred in failing to determine, as a precondition for its action under Section 20a, whether the proposed transaction would violate Section 5(4) of the Act by giving Greyhound control of REA, and (2) that the Commission erred in failing to evaluate the probable competitive impact of the proposed transaction as an element of the "public interest" standard of Section 20a.

1. The Commission's decision not to conduct an immediate Section 5 investigation clearly presents no substantial question. The sole issue here is one of timing. There is no basis for charging the Commission with an abuse of discretion because it chose to defer an investigation under Section 5 of the Act until "the chain of events started by the stock issuance is ascertainable rather than conjectural" (J.S. 39). Upon completion of the stock issuance, Greyhound has undertaken to offer, for sixty days, to buy up to 1,000,000 shares of REA at $20 per share from the present railroad shareholders. The outcome of that offer is uncertain. It is possible, although apparently unlikely, that no stock will be tendered at the offer price. If some stock is tendered by some railroads, others—including appellant railroads—may exercise their right of first refusal and wind up with substantially enhanced control of REA. Or, Greyhound may acquire some or all of the shares it offers to buy. Clearly, the degree to which any of these possibilities are realized will materially affect the extent and nature of Greyhound's control of REA, if any, and the competitive significance of such control. In these circumstances it seems entirely reasonable

that, rather than proceeding on a piecemeal basis, the Commission should postpone an investigation under Section 5 until the situation crystallizes.

The Commission's order constitutes a determination of none of the substantive issues pressed by appellants and it forecloses no avenue of relief. The Commission found that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time" (J.S. 42). The order further states that "if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition" (J.S. 44). Finally, and unequivocally, the order provides that "nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5" (J.S. 44–45). In sum, there can be no doubt that, whatever the outcome of Greyhound's 60-day offer, appellants are free to seek a full investigation under Section 5 when all the relevant facts are ascertainable and that none of the issues which may thus be raised has been determined.[4]

[4] Appellants also urge (J.S. 12–13) that the Commission erred in failing to conduct an investigation under Section 11 of the Clayton Act (15 U.S.C. 21) to determine whether the pro-

2. Appellants further urge that, regardless of the propriety of the Commission's decision to defer an investigation under Section 5, Section 20a requires the Commission to assess the probable competitive impact of the proposed transaction as an element of the "public interest." Such a reading of the statutory language seems at odds with the pattern of the Act and unwarranted by considerations of policy. As noted above (pp. 6–7, *supra*) Section 20a is concerned with preventing the improvident or fraudulent issuance of securities and thus with protecting the financial structure and credit of interstate carriers. Unlike Section 5, which is designed to regulate the merger of carriers and the acquisition of control by one over another, Section 20a confers no power on the Commission to immunize transactions under the antitrust laws (compare *Seaboard Air Line R. Co.* v. *United*

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posed transaction might violate Section 7 of that Act (15 U.S.C. 18). As noted above (p. 6, *supra*), this issue was raised before the Commission by the Department of Justice, whereas appellants confined their allegations of anticompetitive effects to the context of Section 5 of the Commerce Act. Although appellants now suggest (J.S. 15) that *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *Pabst Brewing Co.*, 384 U.S. 546; and *United States* v. *Von's Grocery Co.*, 384 U.S. 270, supply the appropriate standards for a Section 11 investigation, they do not indicate how such standards are to be associated with those appropriate to the potential proceedings under Section 5 (cf. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154). In all events, the Commission decided only that an investigation under Section 7 of the Clayton Act "would not be appropriate at this time" (J.S. 42)—for the same reasons that made an investigation under Section 5 of the Commerce Act appear premature. As the district court concluded (J.S. 39), until the facts become ascertainable, to pursue either line of inquiry would be "no more than an exercise in futility."

States, 382 U.S. 154).[5] Moreover, because Section 20a is addressed exclusively to the *issuance* of securities, it is a wholly inadequate instrument for the purposes appellants would assign to it. Whenever a carrier may acquire the securities of another indirectly, through market transactions or otherwise, Section 20a, unlike Section 5, is useless.

Attempting to read the Act as a rational system of regulation leads to the conclusion that questions of inter-carrier control and related anticompetitive consequences are appropriately considered in proceedings under Section 5 and need not be forced into the text of Section 20a.[6] While it may well be that in some circumstances the Commission will find it desirable and appropriate to examine these questions in advance of approving an issuance of securities, nothing in the statutory scheme requires such inquiry. Insofar as appellants are apprehensive that they will fall between two stools because the anticipated anticompetitive effects may ensue from a relationship between Greyhound and REA that is too limited to constitute "control" under Section 5, it would seem that they have taken an unduly narrow view of that term. This Court has recognized that "control" as used in Section 5 was intended by Congress to have a broad scope and that the Commission has commensurately broad power "to protect its jurisdiction under § 5(2)"

[5] It is unnecessary to consider here the somewhat ambiguous dictum of the district court (J.S. 39) concerning the relevance of *Seaboard* to Section 20a. We do not understand the court to indicate that the Commission may confer antitrust immunity under Section 20a.

[6] See *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415.

(*Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 125).[7] It therefore seems likely that a measure of inter-carrier influence sufficient to involve an undue restraint on competition would also involve sufficient control to invoke Section 5. Indeed, were the Act read otherwise, Section 5 would be powerless to reach a wide variety of security transactions—such as open market purchases—that clearly cannot be reached under Section 20a.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1966.

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[7] See *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 163–165; *Chesapeake & Ohio Ry. Co. Purchase*, 271 I.C.C. 5, 15–17, 38–39, 43.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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IN THE

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OCTOBER TERM, 1966

No. 305

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v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLANTS' REPLY TO MOTIONS TO AFFIRM

Of the two Motions to Affirm, that of the United States and the Commission is especially notable, for it serves to underscore the importance of the questions of statutory interpretation presented by this appeal. REA and Greyhound are content to rest upon the lower court's theory that the issues raised by appellants were "premature" until the expiration of Greyhound's 60-day stock purchase offer. The United States and the Commission, however, evidently perceive one of the principal flaws in this simplistic approach: Since appellants cannot bring a private Clayton Act injunction suit, how could they raise the section 7 issue at the expiration of the Greyhound offer if this Court were to affirm the Commission's section 20a(2) order?

The United States and the Commission propose a two-step response. First, appellants have no cause to complain

about the section 20a(2) order, because that section requires only that the Commission consider the fiscal aspects of a proposed transaction regardless of its possible anticompetitive impact. Second, affirmance by this Court—whether on the basis of a restrictive reading of section 20a(2) or on the "prematurity" rationale—would not foreclose appellants from securing relief against a section 7 violation, because appellants would retain the right to petition the Commission for a section 5 hearing at the termination of the 60-day offer, and it "seems likely that a measure of inter-carrier influence sufficient to involve an undue restraint on competition would also involve sufficient control to invoke Section 5" (p. 12). In other words, it "seems likely" that there could not be a violation of section 7 of the Clayton Act absent an acquisition of control requiring a proceeding under section 5 of the Interstate Commerce Act, and in consequence the appellants' interests will be adequately safeguarded by the availability of relief under section 5 in the event this Court affirms the denial of relief in the case at bar.

This attempt to salvage the Commission's order underscores the applicability of the rule of *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94, which was designed in large measure to foreclose a defense of an agency order newly devised in the office of appellate counsel. But more important is the consideration that, in mounting such a defense in this case, appellate counsel have introduced two additional issues of statutory construction that are of considerable significance—the relationship between sections 5 and 7 and the scope of section 20a(2). We show below that the Government's truncated reading of the "public interest" and "lawful object" standards of section 20a(2)—which was urged in the lower court by REA but not by the Government and which was not accepted by that court—

is untenable. We show also that the Government's contention respecting the relationship between the section 7 and section 5 standards—which has never to this point been advanced in this proceeding by anyone—is insupportable. In short, the United States was correct in urging before the Commission the necessity of deciding the section 7 question; it is incorrect in urging this Court summarily to sanction the Commission's avoidance of that question.

1. *Scope of section 20(a)2.* As the Government has recast the case,[1] the threshold issue is the scope of section 20(a)2. If under that provision the Commission may scrutinize only the fiscal soundness of a proposed transaction, the effort of the lower court to identify the factual circumstances justifying the Commission's refusal to consider the section 7 and section 5 issues was quite beside the point —the justification is the limited reach of the statute, not the uncertainties created by the 60-day Greyhound offer.

This question of statutory construction was thoroughly canvassed in the lower court. There REA maintained that section 20a was designed only to "eliminate unsound financing" (Br. p. 17), so that the Commission was entirely free to approve the transaction without considering the section 7 and section 5 issues. While the Commission's order was silent as to the scope of section 20a(2), and while counsel for the Commission did not endorse REA's argument in the lower court,[2] we argued the issue fully because an essential premise of our impeachment of the order was that an ingredient of the "public interest" and "lawful object" standards of section 20a(2) was the probable anticompetitive impact of a proposed stock acquisition.

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[1] We sometimes in this Reply refer to the United States and the Commission collectively as the "Government."

[2] In the lower court, the United States neither supported nor opposed the Commission.

The lower court did not accept REA's contention that section 20a(2) deals only with fiscal matters. Rather, the court held that "the principles announced in *Seaboard* [*Air Line R. Co.* v. *United States*, 382 U.S. 154] as applicable to a §5 merger proceeding . . . apply to a §20a stock issuance proceeding" (J.S. 39). To be sure, we contended below, and urge here (J.S. 21), that the Commission's order is infirm even as measured by the *Seaboard* rule. The lower court's assertion that the Commission "has not shut its eyes to the competitive effects" of the transaction (J.S. 39) cannot make it so; as we have indicated (J.S. 21), the Commission *did* shut its eyes. And we also contended below, and urge here (J.S. 22-23), that the *Seaboard* principle does not go far enough in a section 20a(2) proceeding, because under that provision, as opposed to section 5, the Commission must strictly apply the standards of section 7 of the Clayton Act. However, in view of the lower court's rejection of the REA argument that a section 20a(2) proceeding should be confined to fiscal questions, we saw no occasion to reargue the issue in our Jurisdictional Statement.

Now, however, while REA does not renew its contention as to the scope of section 20a(2), that contention is for the first time embraced by counsel for the Government. Thus, they assert that our "reading of the statutory language seems at odds with the pattern of the Act and unwarranted by considerations of policy," and that "questions of intercarrier control and related anticompetitive consequences . . . need not be forced into the text of Section 20a" (Motion pp. 10, 11).[3]

[3] The Government apparently is not entirely comfortable with its reading of the section, for it adds, "While it may well be that in some circumstances the Commission will find it desirable and appropriate to examine these questions in advance of approving an issuance of securities, nothing in the statutory scheme requires such inquiry." Thus the Commission is to be

It perhaps would be sufficient to point out that nothing in the Commission's order suggests that it was based upon such a construction of section 20a(2). However, because of the importance of the question we summarize the considerations that demonstrate the invalidity of the Government's contention.

While doubtless it is true that a primary concern of the Congress in enacting section 20a(2) was to equip the Commission with authority to prevent fiscal manipulation, it is at the same time just as true that the Congress employed terms—"public interest" and "lawful object"—inconsistent with an intent to restrict the Commission's inquiry to that single subject. And appellees cite not a single item of legislative history evidencing a legislative purpose narrower than that reflected by the broad statutory language.

Moreover, appellees' position is quite at odds with relevant precedent. There are a number of decisions under other statutory provisions involving the question whether the term "public interest" or its equivalent, when used as a standard of administrative action, requires the agency to evaluate the impact of its action upon competition. Every such decision that we have been able to discover arrives at the same conclusion: The agency may not ignore the policies of the antitrust laws.

In the interstate commerce area, as we have already pointed out (J.S. 21), this Court has established the rule that, in determining under section 5 whether a proposed transaction is "consistent with the public inter-

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left free, in its unreviewable discretion, to consider, or not to consider, questions of probable violation of section 7. It can neither be "required" to conduct nor to forego such an inquiry. Surely neither precedent nor common sense supports conferring upon the Commission the absolute authority to expand and contract the content of the "public interest" and "lawful object" standards of the statute.

est," the Commission "must estimate the scope and appraise the effects of the curtailment of competition which will result. . . ." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 86. This Court has applied a similar rule in defining the obligation of the Federal Power Commission when passing upon merger applications under a "public convenience and necessity" standard. "Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of 'public convenience and necessity' . . . is found in the laws of the United States." *California* v. *Federal Power Comm'n*, 369 U.S. 482. See also *City of Pittsburgh* v. *Federal Power Comm'n*, 237 F.2d 741, 754 (D.C. Cir. 1956) ("Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question of whether a particular certificate is required by the public convenience and necessity.").

As to the Federal Communications Commission, this Court has held that, in directing the Commission to discharge its licensing authority in terms of the "public interest, convenience, or necessity," "Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraint upon commerce." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224. See also *Mansfield Journal Co.* v. *Federal Communications Comm'n*, 180 F.2d 28, 33 (D.C. Cir. 1950) ("It is certainly not in the public interest that a radio station be used to achieve monopoly."); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 ("There can be no doubt that competition is a relevant factor in weighing the public interest."). And the same rule governs the

Federal Maritime Board. See *Greater Baton Rouge Port Commission* v. *United States*, 287 F.2d 86, 95 (5th Cir. 1961), *cert. den.*, 368 U.S. 985.

Our argument that "public interest" as used in section 20a(2) includes a consideration of the anticompetitive features of a proposed transaction is even stronger than in the cited cases. In all of them except *McLean*, the agency in question had no authority—and no obligation—to enforce the antitrust provisions relevant to the proposed transactions, whereas the Interstate Commerce Commission is responsible for the enforcement of section 7 of the Clayton Act. Moreover, in *McLean* the Court declared an obligation on the part of the Commission to consider the anti-competitive impact of the transaction despite the fact that the Commission under section 5 could grant immunity from the antitrust laws. It would seem that, where the Commission is acting under a provision like section 20a(2) that does not empower it to grant antitrust immunity, the obligation to take the Clayton Act into account would be even clearer.

While we could marshal additional support for our position,[4] we conceive the office of motion papers as excluding a more extended discussion. What we have said, we submit, is more than enough to establish that appellees' argument

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[4] For example, Commission decisions under provisions cognate to section 20a(2) fortify our argument. Thus in applying the interlocking directorate provision of section 20a(12), 49 U.S.C. 20a(12), the Commission has considered probable anticompetitive impact and has read the provision in light of section 8 of the Clayton Act, which also deals with interlocking directorates. See *Chesapeake & O. Ry. Co. Purchase*, 271 I.C.C. 5, 43, where the Commission stated: "The policy of Congress is to be found not only in the consolidation provisions of the Interstate Commerce Act, but also in the antitrust acts." The Commission has also, in a section 20a(2) proceeding, held that the competitive bidding requirements of section 10 of the Clayton Act, 15 U.S.C. 20, are relevant, and has in consequence required competitive bidding. See *Columbia Terminals Company—Issuance of Notes*, 40 M.C.C. 288 (1945).

respecting the scope of section 20a(2) is hardly a sufficient basis for a motion for summary affirmance.

2. *The District Court's application of* Seaboard. In our Jurisdictional Statement (pp. 21-23), we contend that the lower court's decision rested in part upon a misapplication of the *Seaboard* decision. REA and Greyhound say not a word about this issue, and the Government avoids it with a rather gingerly footnote assertion that the court's discussion of *Seaboard* amounted to "somewhat ambiguous dictum" (Motion, p. 11 n. 5).

Of course, had the lower court adopted the Government's theory that competitive considerations do not fall within the compass of section 20a(2), then any discussion of *Seaboard* would have been *dictum*. But, as we have indicated, the lower court rejected that statutory analysis. The question in that court then became one of determining what standards the Commission should have applied. Appellants maintained that, since the Commission did not have the power to immunize the proposed transaction from section 7, and since the Commission was obliged to enforce section 7, the Commission was bound to measure the transaction against the standards of that provision; and appellants contended further that, so measured, the transaction should not have been approved because the record disclosed the probability of a section 7 violation whatever the outcome of the Greyhound 60-day offer.

The District Court's response was, not that we erred in our appraisal of the record, but that we erred in our contention that the Commission was strictly bound to apply section 7 in a section 20a(2) proceeding. Rather, the court held, the governing principle was that of *Seaboard*, under which the Commission may approve a transaction "notwithstanding a potential violation of the antitrust laws if it makes adequate findings, after weighing the effects of the curtailment of competition against the advantages of

improved service, that the merger would be consistent with the public interest . . ." (Op., J.S. 38-39). Moreover, the court concluded that the *Seaboard* rule was flexible enough to permit the Commission in the case at bar to approve the transaction without making *any* appraisal of its competitive impact.

This analysis of *Seaboard* by the lower court, thus, is neither "somewhat ambiguous" nor "dictum." And summary affirmance by this Court would surely be regarded by the lower courts and the Commission as establishing both that in a section 20a(2) proceeding the Commission need not apply section 7 standards and also that, in either a section 20a(2) *or* a section 5 proceeding, the Commission need not gauge the anticompetitive effect of a proposed transaction at all if for some reason the Commission believes that such an inquiry would be "premature."

3. *Impact of the Commission's order.* Appellees REA and Greyhound rest upon the argument that "[t]he only question presented by this appeal is one of procedural timing" (p. 7), and that this question is obviously insubstantial. Of course, if the Commission's order will have no effect upon appellants other than to delay for 60 days their right to secure a hearing, appellants have been misguided in pursuing this litigation. But the order will have a much more significant impact for two reasons that we have already outlined (J.S. 19-20) and as to which only the Government attempts a partial—and, as we show below, a fallacious—response.

First, it is indisputably true that, whatever the outcome of the 60-day offer and even if the Commission were to commence some sort of proceeding at the termination of that offer, the basic 20% stock transaction—together with any additional stock acquisitions made by Greyhound under the 60-day offer—will be in effect at least until the conclusion of whatever proceeding the Commission might

commence. The evidence of record, read in the light of the case law outlined in our Jurisdictional Statement (pp. 13-18), indicates that the basic 20% transaction alone would probably constitute a section 7 violation, and this is so even if dissident REA stockholders were to acquire the additional 1,000,000 shares of stock. Thus, the approval by the Commission of the stock issuance forecloses the type of prophylactic relief that this Court has viewed as the most desirable remedy in dealing with Clayton Act violations. See J.S. 20.

Such a result should not be sanctioned in the absence of compelling justification for the Commission's action, particularly in a case where, as here, the evidence respecting the anticompetitive purpose of the transaction is so unambiguous. There is no such justification in this case. As we have pointed out (J.S. 18), if the Commission thought that as an administrative matter it would be preferable to know the result of the 60-day offer before examining the section 7 question, it could readily have denied section 20a(2) approval unless the parties reformed their contract so that the offer would expire prior to the filing of a section 20a(2) application.[5]

Second, and even more important, termination of the section 20a proceeding may very well deprive appellants of any legal remedy whatever respecting the probable anticompetitive effect of the transaction, in view of the fact that

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[5] REA and Greyhound state this this would have been "unrealistic," but the only reason given is that the contract "took almost a year to negotiate" (Motion p. 6, footnote). The REA documents of record describe in some detail the contractual provisions that required extensive negotiation, but nowhere is there any intimation that anyone had any interest in whether the stockholders should decide to sell or to buy prior or subsequent to Commission action. In any event, if reformation were required in order that the Commission could comply with its statutory duty, objections of private parties would hardly be relevant. Obviously, an applicant might favor a contractual provision that enabled immediate consummation of a transaction and postponement for an indefinite period of any Commission determination of its legality under sections 5 or 7.

injunctive relief respecting a section 7 violation may not be sought against companies subject to Commission jurisdiction. 15 U.S.C. 26. If the section 20a(2) order, once affirmed by this Court, forecloses appellants from claiming before the Commission a legal right to an investigation of the anticompetitive impact of the transaction at the termination of the 60-day offer—a right that could be enforced by judicial review of the Commission's denial of a hearing—then clearly this case does not involve just a matter of "timing."

All appellees perceive this difficulty, and all attempt to deal with it by relying upon appellants' right to complain to the Commission under section 5(7) of the Interstate Commerce Act (REA, p. 8; Govt., p. 11).[6] But only the Government tries to anticipate the obvious objection that the right to a section 5 hearing might well not be adequate because the REA-Greyhound relationship might result in a violation of section 7 without Greyhound's "controlling" REA within the meaning of section 5. As to this, the Government advances its most ingenious contention—that appellants need not be "apprehensive that they will fall between two stools" because "it seems likely that a measure of inter-carrier influence sufficient to involve an undue restraint on competition would also involve sufficient control to invoke Section 5" (p. 12). Thus, the Government's

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[6] For the sake of completeness, we note that, while section 11 of the Clayton Act, 15 U.S.C. 21, empowers the Commission to investigate possible section 7 violations, no party has suggested that a private party could secure judicial review of a refusal by the Commission to act under that provision. Section 11—which also confers jurisdiction upon the Federal Trade Commission—does not authorize the filing of complaints by private parties, as do provisions such as sections 2 (discrimination), 3 (prejudice), and 5 of the Interstate Commerce Act; and there is no case law suggesting that section 11 was designed to provide a private remedy. In *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25, the Court held that section 5 of the Federal Trade Commission Act, which in terms is similar to section 11, "does not provide private persons with an administrative remedy for private wrongs."

view is that, whenever one company acquires "part of" the stock of another in circumstances establishing a violation of section 7, the first company would also have acquired "control" of the second within the meaning of section 5.

This suggestion as to the relationship of the standards of these two statutes is at odds with their language, with their legislative history, with case law, and with sound policy.

Certainly there is nothing in the language of section 7 suggesting that "control" is a necessary ingredient of a violation. Rather, the use of the "whole or any part of the stock" phrase argues against such a limitation. Nor does the legislative history or the policy of the two statutes justify importing into section 7 the standards of section 5. As the courts have noted too often to bear citation, the purpose of section 7 was "to cope with monopolistic tendencies in their incipiency." Sen. Rept. No. 1775, 81st Cong., 2d Sess. (1950). "Interference at an early stage, if possible, seems the paramount aim." *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953). Restricting the reach of section 7 to those instances where one company has acquired at least working control of another appears inconsistent with this "paramount aim."

Finally, although the issue has not been litigated in this Court, well reasoned decisions of the lower courts establish that there can be a section 7 violation in circumstances in which, even under the most liberal interpretation of section 5, it could not be said that the acquiring company had secured "control" of its competitor. The leading case perhaps is *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953). There, the defendant company had acquired about 24% of the stock of plaintiff, a competing watch manufacturer, in an effort to gain control. Opposing stockholders of plaintiff, however,

established a voting trust of a larger block of stock and thereby acquired "effective working control." *Id.*, at 312. In granting a preliminary injunction, the court, in a penetrating opinion by Judge Hincks, held that the "all or any part of the stock" language of section 7 was designed to include "not only acquisitions of a majority interest and an interest effective to carry control," but also lesser acquisitions. *Id.*, at 315. The court concluded that the provision applied where either the acquisitions "were made pursuant to a plan or purpose to obtain control the achievement of which, at the time the acquisitions were made, was reasonably probable," or where, even absent an intent to obtain control, "there was at least a purpose to obtain minority representation on the Hamilton board." *Id.*, at 314-317.[7]

An identical conclusion was reached on virtually identical facts in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957). There the defendant company had acquired about 23% of the plaintiff company's stock, but its demand to place a representative on the board had been rejected and its purpose of achieving a "closer connection" between the companies had been balked. The court, in issuing a permanent injunction, held that "[w]hen the statute prohibited the acquisition of not merely 'the whole' but also 'any part' of the stock of a competing corporation . . . the statute obviously envisioned a situation where less than control of a competing corporation might be sufficient to be a violation of this section." *Id.*, at 395. The market position of the companies, together with the continuing purpose of

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[7] The Court of Appeals, in an opinion by Judge Frank, affirmed on the first ground—that the purchases were made "for the primary purpose of obtaining such control [and] had this purpose not been frustrated by action of Hamilton's management, Benrus would successfully have carried it out" —and therefore did not consider the ground relating to board representation. 206 F. 2d 738, 740, 741 n. 3.

defendant to secure "working control" and to place a representative on the board, were held to establish a violation. The Court of Appeals affirmed on precisely those grounds. 259 F. 2d 524 (2d Cir. 1958). For a third decision substantially the same as *Hamilton Watch* and *American Crystal Sugar*, see *Briggs Manufacturing Company* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F. 2d 747 (6th Cir. 1960).

In sum, it is clear that, if the decision below is affirmed, appellants may well "fall between two stools," for they may be unable to persuade either Commission or court that Greyhound, at the expiration of the 60-day offer, has acquired "control" of REA, and yet there probably will be a section 7 violation. Of course, if Greyhound acquires enough additional shares to bring it reasonably near majority control, this foreclosure of relief would not occur. But, according to REA and Greyhound (Motion p. 5), "the more likely outcome is that one or more of REA's present stockholders (including appellant railroads) will purchase any tendered stock, leaving Greyhound's holdings unchanged." While in such circumstances, as we have indicated (J.S. 16-17) and as the cases cited above establish, the evidence of a section 7 violation would still be very strong, it would indisputably be much more difficult—and impossible if a unified group of railroads acquired the entire 1,000,000 shares—to establish that Greyhound "controlled" REA.

4. *Definition of market.* REA and Greyhound in their Motion (p. 9) attempt to cast some doubt upon the importance of the section 7 question. It should be sufficient to note that neither the District Court nor any appellee has taken the position that the Commission rested its order upon a determination that the transaction would not involve a section 7 violation, and that the Motion of the United States and the Commission does not suggest that the section 7 question is not significant. The United States

hardly could, for it alleged before the Commission that "the application places before the Commission serious questions under section 7 of the Clayton Act which by virtue of section 11 thereof the Commission has a duty to enforce" (Petition p. 3).

The REA-Greyhound assertions about definition of the express market are quite insubstantial. Thus, for example, in the hearings referred to by those appellees to support the contention that the Post Office Department is a principal competitor in the express market, the President of REA testified that REA, "the final embodiment of a once widespread express industry," is "the only remaining express company of over 100 which were in existence some decades ago," and that "there is a tremendous difference between our business and the business of UPS [United Parcel Service] and parcel post." And in those same hearings the Chairman of the Interstate Commerce Commission characterized REA as "the largest transporter of express and small shipments."[8]

We recognize, of course, that no final conclusion as to market control can be made absent a hearing. However, surely a *prima facie* showing of the distinctiveness of the express market arises from the fact that, as we have pointed

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[8] Hearings before the Subcommittee on Postal Rates of the Committee on Post Office and Civil Service on H.R. 12367, pp. 234, 238, 242, 468, 472.

It also may be noted that a Vice President of Greyhound, speaking for all intercity bus carriers, underscored the critical importance of express traffic to the bus companies. "For over 20 years the intercity bus industry has been supplying a steadily increasing volume of expedited package express service, which currently accounts for about 10 percent of the total revenues of the carriers. The intercity bus industry furnishes the only means of public line-haul transport for hundreds of communities which, for economic reasons, the railroads and airlines do not serve . . . . *Much of this essential service provided by buslines particularly that for smaller communities, is noncompensatory and could not possibly be continued were it not for supplementary revenues derived from such services as package express.*" (Emphasis supplied.) *Id.*, at p. 442. This indicates appellant motorbus carriers do not exaggerate the damage that may be done to motorbus competition—and motorbus service—by consummation of the REA-Greyhound transaction (J.S. p. 20).

out (J.S. 14), "[t]he Commission has consistently recognized certain fundamental differences between express service and ordinary freight service." *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 135 (1952). Since the Commission considers express service as sufficiently distinctive to issue certificates in terms of express carriage and to forbid both REA and motor carriers whose certificates limit them to express service from engaging in non-express carriage,[9] it is hardly unreasonable to conclude that there is probably a separate market for that type of service.[10]

5. *Raising of the section 7 question before the Commission.* The Government, noting that the Justice Department did not petition the Commission for reconsideration, also asserts that "the Clayton Act issue was not urged in any of the petitions filed by the other parties" (p. 6). This is incorrect. Thus, appellant ATA's Petition for Reconsideration alleged that the transaction would result in a "virtual monopoly of the country's express traffic" and would "substantially lessen competition" and hence would not be in the "public interest," and ATA accordingly prayed for a hearing to determine whether the transaction was "in

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[9] See, *e.g.*, *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131 (1952), 63 M.C.C. 573 (1955); *Railway Express Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962), *aff'd sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328, 332, *aff'd*, 376 U.S. 514; *Mistletoe Exp. Service Extension—Texas*, 61 M.C.C. 737, 744-745 (1953); *Railway Express Agency, Inc.—Durant-Kosciusko*, 34 M.C.C. 111, 114 (1942); *Railway Express Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363, 371 (1941).

[10] In a footnote (p. 9), REA states that, in its Answer to Southern Pacific's section 5(7) complaint before the Commission, REA alleged that, considering the market as extending to all small packages, it handled only 2% of the business, and Greyhound less than 1%; and REA states further that this allegation was not controverted. Putting aside the fact that this allegation was not made in the section 20a(2) papers or in answer to the Government's section 11 petition, where it would have been relevant, the fact is that Commission Rule 1.36(b) (49 C.F.R. 1.36(b)) forbids replications to an answer so that a denial could not have been filed.

conformity with the requirements of sections 20a, 214, and 5 of the Act, Congress' national transportation policy, and section 7 of the Clayton Act" (pp. 6, 9). As for the petitions of other appellants, the United States now reads them differently than it did before the Commission, where it stated that the protests were "tantamount to allegations that the effects of the proposed transaction may be substantially to lessen competition or to tend to create a monopoly" (Petition, p. 3).

Moreover, the point is quite irrelevant. Putting aside pleadings of others, the United States and REA argued the section 7 issue,[11] and it was passed upon by the Commission. In these circumstances, it is established that any party can secure judicial review of the issue. *Hennesey* v. *SEC*, 285 F.2d 511, 515 (3d Cir. 1961); *Wilson & Co.* v. *United States*, 335 F.2d 788, 794 (7th Cir. 1964).

6. *The section 5 question.* Appellees' arguments about the section 5 issue have been dealt with adequately in our Jurisdictional Statement. While it is true that appellants may in the future raise the section 5 question—as opposed to the section 7 issue—in a complaint under section 5(7), the Commission nonetheless should not have sanctioned as in the "public interest" a transaction that may well run afoul of section 5(4) without settling that question. If it wished to have all uncertainties resolved before holding a hearing, it should have refused section 20a(2) approval unless the parties reformed their contract so that the 60-day offer would expire prior to Commission approval.

7. *Fatal ambiguity of the order.* In our Jurisdictional Statement (pp. 24-27), we described the failure of the Commission's order to disclose clearly the grounds upon which it was based. The Government does not respond at all, and

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[11] In addition to the Petition of the United States, see REA's Reply to all Protests, pp. 3, 9-12, and Reply to all Petitions for Reconsideration, pp. 8-13.

REA and Greyhound reply simply that the order "was not in any respect ambiguous"—which presumably means that one can see "by a quick reading" that it is based, as the District Court thought and as REA and Greyhound agree, upon the uncertainties created by the 60-day offer (Motion p. 10). But if this is so, it is rather surprising to find the Government defending the order in part upon a construction of section 20a(2) that would exclude anticompetitive considerations. Government counsel presumably believe that this can be read into the order, since of course they are well aware that "the courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168.

In truth, there is no way of telling whether the Commission's action was based upon a limited reading of section 20a(2), upon a desire to await the outcome of the 60-day offer, upon a desire to await the consummation of particular working arrangements between REA and Greyhound, upon a feeling that the record did not disclose a section 7 violation, upon a conviction that even if it did the Commission could immunize the parties, or upon a wholly unrelated ground. In sum, this is a case in which the Commission has "shelter[ed] behind uncritical generalities or such looseness of expression as to make it essentially impossible for [the court] to determine what really lay behind the conclusions." *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 81. The violation of the *Chenery* rule is so palpable, and the rule itself so well established, that as to this issue summary reversal would, we suggest, be quite in order.

Conclusion

The considerations central to disposition of appellees' motions are clear: Two mammoth business enterprises, each dominant in its own field, propose entering into a stock and management relationship designed to achieve coordination

of their efforts in the area in which their activities overlap. The Commission has approved that arrangement as in the "public interest" and " for a lawful object" without considering whether it would violate section 7 of the Clayton Act, despite the fact that the Commission has been charged with the responsibility of enforcing that Act and that the protesting private parties are not free to bring independent section 7 suits. Unless the Commission in the future concludes that Greyhound has acquired control of REA—which REA and Greyhound say is not a likely outcome of the Greyhound stock purchase offer—termination of the section 20a(2) proceeding will permanently deprive appellants of any remedy against the apparent section 7 violation. Appellees seek termination of that proceeding by summary affirmance by this Court. That effort should not succeed. The motions should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the District Court, which is reported unofficially at 14 Fed. Car. Cases ¶ 81,814, appears in the Transcript of Record at pages 405-416. The order of the Interstate Commerce Commission that is in issue appears in the Record at page 304, and a prior related order of Division 3 of the Commission appears at page 197.

Jurisdiction

The judgment of the District Court was entered on April 11, 1966, and the notice of appeal to this Court was filed on May 3, 1966. Probable jurisdiction was noted on October 17, 1966, —— U.S. ——. The jurisdiction of this Court rests upon 28 U.S.C. 1253 and 2325.

Questions Presented

The order of the Interstate Commerce Commission here in issue approved the proposal of Railway Express Agency, Inc. (hereinafter "REA") to issue 20% of its capital stock for sale to The Greyhound Corporation (hereinafter "Greyhound") where the record established that the companies were the nation's principal transporters of package express, that Greyhound's stock interest would be accompanied by a 20% representation on REA's board of directors, that Greyhound intended ultimately to secure a majority stock interest in REA, and that the purpose of both companies in entering into the transaction was to coordinate and consolidate their express activities. The Commission's order was entered, without an evidentiary hearing, under sections 20a(2) and 214 of the Interstate Commerce Act, 29 U.S.C. 20a(2), 314, which required the Commission to determine that the proposed transaction was in the "public interest" and for a "lawful object." The questions presented are:

1. Under the "public interest" and "lawful object" standards of sections 20a(2) and 214, and in view of the Commission's obligation under section 11 of the Clayton Act, 15 U.S.C. 21, to enforce section 7 of that Act, 15 U.S.C. 18, was the Commission free to approve the proposed transaction without considering its possible anti-competitive impact?

2. Under sections 20a(2) and 214, was the Commission

obliged to determine whether the proposed transaction would result in an illegal acquisition of "control" by Greyhound of REA within the meaning of section 5(4) of the Interstate Commerce Act, 49 U.S.C. 5(4)?

3. If the Commission did in fact determine that the transaction would not violate section 5(4) because there would be no acquisition of "control," is that finding adequately supported by the record?

4. Does the Commission's order set forth with sufficient clarity the findings and reasons supporting its decision?

Statutes Involved

The statutes involved are portions of sections 7, 11, and 16 of the Clayton Act, 15 U.S.C. 18, 21, 26; portions of sections 5, 20a, and 214 of the Interstate Commerce Act, 49 U.S.C. 5, 20a, 314; and section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), all of which are set forth in the Appendix hereto.

Statement

The fundamental question raised in this case is whether appellee the Interstate Commerce Commission adequately discharged its statutory responsibilities in approving the acquisition by appellee Greyhound—the nation's second ranking carrier of express freight—of a substantial stock and management interest in appellee REA—the first ranking carrier of express freight. Appellants—minority railroad REA stockholders, motor bus competitiors of Greyhound, motor carriers, and freight forwarders—attack the order on essentially three grounds: (1) that the Commission was not free to ignore, as it did, the probable Clayton Act section 7 violation disclosed by the record; [1] (2) that the Com-

[1] For the text of section 7, see Appendix p. 59, *infra*.

mission was obliged also to determine whether the proposed transaction would result in an illegal acquisition by Greyhound of "control" of REA within the meaning of section 5 of the Interstate Commerce Act, 49 U.S.C. 5, and that if its order be read to include a determination that such "control" would not result, the determination is insupportable;[2] and (3) that the Commission's order did not set forth with adequate clarity the grounds supporting its decision and hence is invalid under section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b).[3] Accordingly, apart from the order itself, the relevant facts are principally those that bear upon the relationship to be established between REA and Greyhound—a factor pertinent to both the section 7 issue and the section 5 "control" issue—and upon the potential competitive impact of that relationship. Since the Commission refused to hold a hearing, those facts must be taken from the pleadings before the Commission; and, as we shall indicate, the most revealing pleadings are those filed by REA. However, in this statement we also devote considerable attention to the pleadings filed by appellants, both because the allegations contained therein relate to the potential competitive injury of the proposed transaction and also because, both in the lower court and in motions to affirm in this Court, there have appeared suggestions that the Clayton Act issue was not adequately brought to the attention of the Commission.

1. *REA's application.* This controversy began on October 7, 1964, with an application by REA under sections

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[2] Section 5(4) makes it illegal for one carrier to secure control of another without Commission approval after the type of proceeding required by section 5. For the statutory provisions, see Appendix pp. 64-70, *infra*.

[3] For the text of section 8(b), see Appendix p. 74, *infra*. The Administrative Procedure Act has recently been codified, P.L. 89-554 (Sept. 6, 1966); but no material change was made in section 8(b), which now appears as 5 U.S.C. 557(c), 80 Stat. 387.

20a(2) and 214 of the Interstate Commerce Act, 49 U.S.C. 20a(2), 314, for approval by the Interstate Commerce Commission of the issuance by REA of 500,000 shares of its authorized but unissued stock to Greyhound for a price of $10,000,000 (R. 1-41). REA had almost 2,000,000 shares outstanding (R. 3), so that Greyhound, if the application were granted, would hold 20% of the total REA stock. Section 20a(2) requires carriers subject to Part I of the Act to secure Commission approval for the issuance of securities, and empowers the Commission to approve only if the transaction is "compatible with the public interest," "for some lawful object within [the applicant's] corporate purposes," and "necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier" (App. *infra* p. 71). Section 214 applies section 20a to carriers subject to Part II, such as REA (App. *infra* p. 73). (For the sake of brevity, we hereafter refer only to section 20a.)

In its application, REA asserted that these statutory tests were met because, first, REA needed the purchase money to effect a capital improvements program, and, second, the intercorporate association of the two companies would promote the consolidation and coordination of their express services. As to REA's financial requirements, REA alleged that when its railroad stockholders put it on a profit-and-loss basis on July 1, 1961—it had previously operated on a non-profit basis—"its ratio of debt to capital stock placed it at a disadvantage in attempting to borrow funds"; that its retained earnings would not be sufficient to permit planned expenditures for terminal improvements and acquisition of automotive equipment; and that the $10,000,000 to be paid by Greyhound to REA for its stock would improve the debt to stock ratio and permit the necessary borrowings (R. 5-6).

As to the coordination factor, REA stated that the trans-

action "will give Greyhound a sufficient equity interest in the Applicant to provide a working basis which will justify the Applicant and Greyhound in going forward with the study of, and ultimately entering into an agreement with respect to, the consolidation of certain operating functions and facilities with a view to effecting economies, improving service and increasing public receptivity and patronage" (R. 7).

2. *The REA-Greyhound contract.* A number of provisions of the REA-Greyhound contract, which was annexed to the application (R. 15-18), related to the manner and degree in which Greyhound would participate in REA management and to the parties' mutual purpose of combining their express activities. The contract, which consisted of an October 1, 1964, letter by REA to Greyhound that was accepted by Greyhound, provided for the sale of the 500,000 shares of REA stock at $20.00 a share upon the following terms:

a. The REA by-laws were to be amended to permit Greyhound to name 20% of the REA board of directors.

b. The REA board was to work out a way of securing a cancellation of the outstanding prohibition against payment of dividends.

c. The REA Board was to adopt a resolution "declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage."

d. The REA Board was to adopt a resolution "declaring the intention to consider seriously at a later

time the sale of some REA stock to airlines and/or the general public. . . ."

e. Greyhound offered to purchase up to 1,000,000 additional shares of REA—which would give Greyhound up to a 60% stock interest—from present stockholders at $20 per share for a period of 60 days from the closing of the sale of the 500,000 shares.

These provisions indisputably supported REA's allegation that the transaction would give Greyhound a sufficient interest in REA to promote collaboration between the two companies and that such collaboration was a principal goal of the parties. However, since the consolidation of REA and Greyhound services promised to advantage REA and Greyhound at the expense of their competitors, quite naturally the application triggered objections. Moreover, the potential damage to competition was so severe that the opponents of the proposal included the United States.

3. *Protests against the application.* Petitions to intervene and protests were promptly filed by appellee the United States and by the appellants, who consist of five minority REA railroad stockholders, nine motor carriers, the national association of motor carriers and one of its conferences, the national association of freight forwarders, and seventeen motor bus companies.[4] In addition, one of

[4] More specifically, appellants are: The Denver and Rio Grande Western Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; Southern Pacific Company; Ringsby Truck Lines, Inc.; Navajo Freight Lines, Inc.; Denver-Chicago Trucking Company, Inc.; Illinois-California Express, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Western Gillette, Inc.; Consolidated Copperstate Lines; American Trucking Associations, Inc.; Regular Common Carrier Conference; Freight Forwarders Institute; Transcontinental Bus System, Inc.; American Buslines, Inc.; Arkansas-Motor Coaches Ltd., Inc.; Bayshore Bus Lines, Inc.; Continental Bus System, Inc.; Continental Crescent Lines, Inc.; Continental

the appellants, the Southern Pacific Company, filed with the Commission a complaint under section 5(7) of the Interstate Commerce Act, 49 U.S.C. 5(7). Taken together, these pleadings alleged the necessity of a hearing so that the Commission could explore the questions whether the proposed transaction would result in acquisition by Greyhound of "control" of REA, which could only be authorized in a proceeding under section 5 of the Interstate Commerce Act, and whether the transaction would result in such serious competitive injury as to be proscribed by section 7 of the Clayton Act or in any event to be incompatible with the "public interest" standard of section 20a(2).

Thus, the petitions of the Freight Forwarders Institute, the dissident railroad stockholders, and the motor carriers, while asserting the illegality of the transaction in open-ended terms, dealt explicitly only with the section 5 question (R. 42-52, 63-64, 68-70, 79-82), as did Southern Pacific's section 5(7) complaint (R. 180-184). On the other hand, appellant motor bus competitors of Greyhound focused primarily upon the damage to their express business that might result from the proposed transaction. After pointing out that they were carriers of express in competition with both Greyhound and REA, these appellants alleged in part as follows:

> "The Greyhound Corporation is a holding company which controls the largest motorbus company in the world, i.e., Greyhound Lines, Inc. . . . Railway Express Agency, Inc. . . . is the world's largest express company.

Panhandle Lines, Inc.; Continental Southern Lines, Inc.; Continental Tennessee Lines, Inc.; Denver-Colorado Springs-Pueblo Motorway; Denver-Salt Lake-Pacific Stages, Inc.; Continental Pacific Lines, Inc.; Midwest Buslines, Inc.; Smoky Mountain Stages, Inc.; Tennessee Trailways, Inc.; Union Bus Lines, Inc.; and Muscatine, Davenport and Clinton Bus Company.

> "Under this proposal Greyhound would acquire 20% of the stock of R.E.A., and this, in connection with other aspects of the application, present matters of grave concern to the Petitioners. The Applicant has stated in its application that the proposal will 'provide a working basis' for R.E.A. and Greyhound 'entering into an agreement with respect to, *the consolidation of certain operating functions and facilities* . . .' (Page 7 application. Emphasis added) [.] No motorbus company could hope to meet the competition offered by a consolidation of the R.E.A. and Greyhound terminal facilities and operations. It would, in effect, destroy all competition in the package express phase of motorbus transportation, and would, therefore, not be compatible with the public interest" (R. 58).

Similarly, the National Trailways Bus System, an association of which appellant motor bus companies are members,[5] stressed the critical importance of express revenues to the motor bus companies that compete with Greyhound:

> "The member carriers of National Trailways Bus System consider the transportation of express throughout the United States as a vital and indispensable source of revenue. In many instances, the transportation of express by these member carriers will provide the difference between a profit and a loss in the over all transportation activities of these carriers. In those instances, therefore, it is imperative that the express traffic which these carriers are now handling be continued or otherwise substantial deficits will surely result thereby impairing the ability of many member carriers to continue serving the public" (R. 61).

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[5] The association, as such, is not an appellant.

Finally, the Department of Justice stated forcefully and clearly its conviction that the REA application raised "serious" Clayton Act questions that the Commission was obliged to resolve. While the Department said that it did not "at this time" take the position that the transaction would violate section 5—although it "recognize[d] that the proposed transaction and the agreements related thereto raise serious questions of Greyhound control or power to control REA"—the Department continued:

> "But no matter what the Commission may do about instituting a section 5 control proceeding, petitioner asserts that the application places before the Commission serious questions under section 7 of the Clayton Act which by virtue of section 11 thereof the Commission has a duty to enforce. Greyhound will, if the Commission approves this application, acquire a substantial stock interest in REA and establish a working basis with REA to enter into agreements of mutual advantage. Competitors of REA and Greyhound have asserted in papers filed with the Commission that they will be competitively disadvantaged by the proposed transaction. Their protests are tantamount to allegations that the effects of the proposed transaction may be substantially to lessen competition or to tend to create a monopoly. Therefore, the Commission in accordance with its responsibilities under section 11, cannot avoid determining to what extent, if any, the proposed transaction would result in effects which section 7 of the Clayton Act is intended to prevent" (R. 77-78).

4. *Additional data submitted by REA.* After these protests had been filed, REA, in response to a request by the Commission for further information, supplied details re-

specting the transaction that underscored the seriousness of both the section 7 Clayton Act and the section 5 "control" questions. The most significant features of the negotiations between REA and Greyhound, which we describe fully below, were that Greyhound initially tried to secure majority stock control; that this attempt was frustrated by minority REA stockholders who held a right of first refusal on stock sales by the REA stockholders; that Greyhound's acknowledged purpose was, not to acquire the stock for investment purposes, but to achieve a "coordination" of REA and Greyhound express service; that the Board and management of REA shared that goal; that Greyhound and REA reached tentative agreements upon the particular types of "coordination" that would be beneficial; that those agreements reflected a desire virtually to eliminate competition between the two companies; that, pending a change of heart by the REA minority stockholders, Greyhound believed that a 20% stock interest would be a sufficient basis for effecting coordination, provided that its purchase offer was approved by a large enough majority of REA stockholders so that the cooperation of REA management would be assured; and that in fact over 80% of REA stockholders did accept. In more detail, the data supplied by REA disclosed the following:

In January of 1964, Greyhound "approached REA with a proposal . . . to acquire a controlling interest in REA" (R. 82). On the basis of discussions with REA directors, Greyhound had concluded that "there may be an interest on the part of many of the shareholders of REA in disposing of their stock" (R. 93-94). Accordingly, Greyhound submitted a tentative proposal under which Greyhound would offer $25.00 per share for all outstanding REA stock, provided that it acquired at least 67% of that stock, 16% of which it intended to offer to the "major airlines" (R. 93-

97).[6] The REA board of directors requested Greyhound to make a formal offer along those lines (R. 83), which it did in the form of a letter to REA stockholders dated February 21, 1964, asking them to indicate if they assented (R. 99-101). The REA board took no position on this offer (R. 83).

While the record does not disclose in any detail what happened respecting this Greyhound offer, REA represented generally to the Commission that the offer was unsuccessful because some REA stockholders, who held a right of first refusal on offers to sell by other stockholders, indicated they would exercise that right if the stock were offered to Greyhound (R. 83).

In order to circumvent this obstacle to Greyhound's securing an interest in REA, the parties directed their attention to "the possibility of Greyhound's acquisition of 500,000 shares of authorized but unissued REA stock, these shares not being subject to the right of first refusal" (R. 83). The record does not reveal the particulars of the ensuing negotiations, but it is clear at any rate that on July 7, 1964, the REA board of directors approved "in principle" the suggestion of Greyhound that it acquire a 20% REA stock interest together with a 20% representation on the REA board (R. 106-108).

Thereupon Greyhound submitted a formal offer that bared with remarkable clarity Greyhound's ultimate design. Greyhound stated that its "interest in REA . . . stems primarily from our views as to the improvements . . . which could be realized through combination and correlation of certain of our facilities and services"; that the "studies which we have made separately and jointly with your rep-

[6] This desire to include "major airlines" as REA stockholders carried through, as we have noted (*supra* p. 6-7), to the final contract. While Greyhound's purpose is not explained on the record, it is reasonable to infer that Greyhound's ultimate desire is to enlist the cooperation of the airlines in the "coordination" of air express service.

resentatives confirm that there are tremendous possibilities in these respects''; but that ''in order to give Greyhound an incentive to pursue these possibilities it should have at least a 20% equity interest in REA . . . .'' Accordingly, Greyhound incorporated in its offer the requirement that REA commit itself to ''consider seriously and work toward a long-term agreement between REA and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies to be shared by REA and Greyhound . . . .'' Greyhound also stated that it would accept additional REA shares, but that it did not insist upon more than a 20% interest because it did not want controversy with REA minority stockholders to ''delay'' or ''frustrate completely'' the contemplated ''improvements in service.'' Thus, Greyhound was willing to ''leave to the future'' the question of further stock acquisitions (R. 109-112).

While the ''studies'' between REA and Greyhound respecting ''combination and correlation'' of facilities and services are not in general described in the record, there is one important exception—a 2½ day conference between officers of the companies held about three weeks before the REA board approved ''in principle'' the 20% stock transaction. That conference concluded with a ''Memorandum of Understanding'' respecting ''Potential Benefits By Consolidation or Merger of Certain Activities of the Two Companies'' (R. 149-158). The provisions of this document—a blueprint for the elimination of competition—are described in detail in the margin.[7] What was contemplated, in brief,

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[7] The memorandum may be summarized as follows:

1. Because Greyhound's terminal facilities are strained and becoming more and more inadequate, it would use REA's and "REA would perform the terminal services, other than loading and unloading of buses. . . ."

2. Greyhound would take over the service and maintenance work on all REA automotive equipment in 37 cities where now each has garage opera-

was a fusion of REA and Greyhound express activities. Thus, from the physical standpoint, REA and Greyhound would combine their terminals, their depot and express office facilities, their service and maintenance work, their communication, data processing, and accounting facilities and procedures, their safety supervisors and line representatives, and their research activities. From a sales stand-

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tions, and perhaps in 11 more cities. Moreover, Greyhound has "headquarters staff and field supervision sufficient with the addition of a few people to take care of the staff work and field supervision on all REA automotive equipment."

3. REA and Greyhound would utilize "joint communication facilities and the present and proposed data processing system and machine accounting of REA," and they would use to the extent possible joint billing and accounting procedures.

4. The two companies would use the same salesmen and the same advertising program and agency.

5. Wherever REA express depot and express office facilities were satisfactory among the 683 points where both companies have such facilities, Greyhound could use the REA facilities.

6. There is a "very strong possibility . . . for what could be termed a package bus distribution service tied in with REA's Air Express, highway or rail operations." Thus, as to Air Express, off-airline points could be reached by tacking on Greyhound bus express. And "[r]ail-bus express service would create a new capability for the two carriers to compete in the ltl [less-than-truckload] market."

7. Because Greyhound has about 50% excess capacity at the present between other than principal cities, it "could and would offer to REA an attractive linehaul cost" so that REA could utilize Greyhound's capacity instead of using its own trucks or third party trucks. "This will eliminate the expense of REA's over-the-road operations in this category or the third party truck routes. . . ."

8. "Other possibilities" include:

a. Joint purchasing.
b. REA's utilizing Greyhound's highway safety supervisors and line representatives.
c. Greyhound's using REA's research group.
d. "[A] possibility of some consolidated effort or assistance between the Boothe Leasing Corporation of Greyhound and REA Leasing Corporation."
e. Greyhound's using REA to perform pick-up and delivery for its express movements.
f. Greyhound's subsidiary, Greyhound Van Lines, could, as to less than van load volume, have REA provide a rail container service.
g. Again as to Greyhound Van Lines, REA could act as sales agent.

point, they would use the same salesmen, the same agency, and the same advertising program. And, from an operational standpoint, Greyhound would use REA to perform terminal and pickup and delivery services on Greyhound's express movements; REA would use Greyhound's express service to tack on to REA's air and railway express service to reach off-airline and off-rail points; and Greyhound would offer REA an especially attractive arrangement for employing Greyhound instead of REA or third-party trucks to perform the underlying transportation for REA express service between other than principal cities, where Greyhound has about 50% excess capacity. The projected advantages of this blending of the services and facilities of the two companies was, in addition to the paring of costs, "a substantial improvement volume-wise for both Greyhound and REA . . . estimated to be $9,600,000 for REA and $3,900,000 for Greyhound"—for Greyhound, more than doubling its annual growth of express revenue (R. 149, 156).

Despite the REA board's approval "in principle" of the Greyhound proposal, that proposal was not entirely satisfactory to the board in respects not here material. Accordingly, at its meeting of July 28, 1964, the board appointed a committee to attempt to negotiate certain changes (R. 112-113). The report of that committee after conferences with Greyhound further emphasized that express service collaboration was Greyhound's central object.

Thus, the REA committee stated that Greyhound "was reluctant to make another formal offer to REA because it was not clear to them . . . that such a proposal would receive sufficient support from this Board and the REA stockholders to insure that a satisfactory working agreement between REA and Greyhound would be possible." However, according to the REA committee, Greyhound would "look

favorably upon a firm offer from REA . . . if it were adopted by such a substantial vote of the REA Board and stockholders as to carry some measure of assurance that a constructive working relationship could be developed" (R. 115).

The ensuing events confirmed, if confirmation were necessary, that REA was just as intent upon express service collaboration as Greyhound. At the meeting at which final action was to be taken by the REA board, REA's President stated that "in the opinion of the management of REA it would be greatly in the interest of REA" to sell the stock to Greyhound "and to enter into working arrangements with Greyhound which would result in substantial savings for REA and improved service to the public" (R. 115). Accordingly, the board voted 14-3—the "substantial vote" desired by Greyhound to insure the cooperation of REA management—that REA make Greyhound the offer that became the final contract, and that it also pass the resolutions required by Greyhound respecting, *inter alia,* REA's "intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities. . ." (R. 114-125).

The REA board thereupon called a stockholders' meeting to approve the offer. The board's proxy statement recommended approval, and described the negotiations in terms of Greyhound's "obtaining an equity interest in the Corporation with the ultimate purpose of achieving certain economies which could be realized through combination and correlation of certain of the facilities and services of Greyhound and the Corporation" (R. 127, 126-136). Reflecting Greyhound's stated desire for heavy support from REA for the proposal, the proxy statement expressed the opinion of REA's management that Greyhound would probably accept the offer "if said proposals are

adopted by a substantial vote of the stockholders. . .'' (R. 130). The stockholders approved by over an 80% majority, and Greyhound accepted the REA offer, as indicated at the outset of this statement, on October 6, 1964 (R. 84-85).

With the filing by REA of the documents disclosing the foregoing facts, Division 3 of the Commission, before whom the case was pending, had before it all of the allegations and representations upon the basis of which it was to decide whether to hold a hearing or to grant or deny the application without hearing. Except for some later representations respecting competitive injury (*infra* pp. 20-22), which were essentially cumulative, the remaining history of the litigation is material principally to the issue respecting the ambiguity of the Commission's order. In that connection, we next outline briefly the legal position adopted by REA, as well as by the appellants on petitions for reconsideration, and discuss the two orders that were entered by the Commission.

5. *REA's reply to protests.* In its reply to the allegations of interveners, REA urged that its application be approved without a hearing because ''questions of 'control' and effect upon competition are premature in this proceeding and without factual basis'' (R. 159, 160). As to the Justice Department's ''attempt to expand this 20a proceeding into a most novel proceeding involving Section 7 of the Clayton Act'' (R. 165), REA maintained that ''[t]he purchase by Greyhound of a $10,000,000 interest in REA cannot in itself be a violation of Section 7,'' and that if there were collaboration between the two companies in the future ''the Department has an adequate forum at that time to challenge'' such collaboration (R. 166). Thus, REA's views underwent a significant transformation: REA now urged that it would be ''premature'' to consider one of the two reasons—prospective coordination of express services—that in its appli-

cation it had pressed upon the Commission as a reason why the "public interest" would be served by the transaction. See *supra,* pp. 5-6.

As to the section 5 "control" question, REA maintained that "the documents filed with the Commission by REA establish that the proposed stock issue will not give Greyhound such control" because it would have only a minority stock and board representation position. Furthermore, REA maintained that any consideration of the possible impact of Greyhound's 60-day offer to purchase another 1,000,000 shares would be "premature" because the dissident REA stockholders would be able to block any such purchases by exercising their right of first refusal.

6. *Division 3's order.* The Commission's initial order on the merits was issued by Division 3 on March 15, 1965 (R. 197-202).[8] While the Commission's order is hardly a model of clarity, so far as one can tell the Commission accepted REA's contention that it need not consider the probable anticompetitive impact of the proposed stock acquisition. The Commission, of course, was obliged to acknowledge that the section 7 argument had been made; but the Commission disposed of the issue by stating simply that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of . . . section 7 of the Clayton Act, would not be appropriate at this time . . ." (R. 198). The Commission did not indicate why such an investigation would not be "appropriate," and said not one more word about the effect of the acquisition upon competition.

The Commission also held that a section 5 investigation "would not be appropriate at this time" (R. 198). In this connection the Commission did provide some amplification,

[8] In other orders the Commission granted the various motions to intervene (R. 170-171, 179-180).

albeit obscure. As we read the order, it appears that the Commission accepted REA's contention that it would be premature to consider possible developments pursuant to Greyhound's 60-day offer, since "if in the future the acquisition of control . . . becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition" (R. 201). And as to the 20% transaction alone, again the Commission appears to have agreed with REA that this transaction did not confer "control" upon Greyhound because:

> ". . . [Greyhound] was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities. . . ." (R. 200-201).

Having brushed aside as irrelevant the question of the anticompetitive impact of the acquisition, and having held that the record did not disclose that "control" would be either "imminent or apparent," the Commission concluded that there were no factors to balance against REA's claim

that it needed the purchase money. Accordingly, the Commission approved the stock issuance on the basis of fiscal considerations.[9]

7. *Petitions for reconsideration.* All of the protestants except the Department of Justice and one REA stockholder filed petitions for reconsideration. That of appellant motor bus companies is particularly relevant, since it dealt at length with the failure of the Commission to resolve the question of adverse impact upon competition. Those appellants alleged that, in the light of the avowed intent of REA and Greyhound, the Commission's order "means a consolidation of the operating functions and facilities of the largest motorbus company in the world (who derived $30,220,460.00 in 1963 from the transportation of express in the same vehicle with passengers) and the largest express company in the world." This, in turn, would "in effect destroy all competition in the package express phase of motorbus transportation," for "[n]o motorbus company could hope to meet the competition offered by such a consolidation." Since [m]any of the [appellants'] passenger operations are dependent upon express revenue in order to render continuous and adequate service to the public," the projected coordination of REA and Greyhound activities would "result in a restraint of competition and would not be compatible with the public interest." Appellants concluded that a hearing was "imperative," for "[t]he evidence of express revenue subject to diversion consists of voluminous and complicated exhibits," and the "competitive harm . . . cannot properly

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[9] "*It further appearing,* That applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000 . . ." (R. 200).

be developed without the introduction of voluminous exhibits and extensive testimony . . ." (R. 219, 222).

Other protestants, in their petitions for reconsideration, also urged that the Commission erred in failing to consider the section 7 question involved in the transaction between the "nation's second largest transporter of express traffic" and the "largest transporter of express traffic" (R. 264, 267), and in addition contended that, contrary to the Commission's finding, the record disclosed the probability of an illegal acquisition of "control" that was relevant to the "public interest" standard of section 20a(2) (R. 224-225, 265).

In reply, REA asserted that the Commission had correctly concluded that the proposed transaction would not give Greyhound control of REA (R. 278-282), and also—evidently in the alternative—that in any event "questions of effect upon competition and 'control' are irrelevant in this Section 20a proceeding" because the purpose of that provision is restricted to insuring "the integrity of carrier securities" (R. 275). REA also argued, as it had before, that the stock purchase "cannot in itself be a violation of Section 7," so that it was "premature to speculate as to the lawfulness" of coordination agreements that might be made between REA and Greyhound in the future (R. 277-278, 287).

On May 28, 1965, Division 3, acting as an appellate division reviewing its own decision, denied the petitions for reconsideration on the ground that they "presented no error of fact or law" (R. 289-290).

8. *Institution of the lawsuit and the Commission's final order.* On June 7, 1965, the motor bus appellants filed with the Commission a petition for review by the full Commission on the ground that the case involved an issue of "general transportation importance." See Rules of the Commission, Rule 101(a)(4), 49 C.F.R. §1.101(a)(4). The principal

ground alleged was that "many of [appellant motor bus companies'] passenger operations are dependent upon express revenue," and that the "combined efforts of R.E.A. and Greyhound will place [appellants] in the position of being unable to compete with them for express revenue and would only result in a restraint of competition, which result is clearly incompatible with the public interest" (R. 300-301).

Nine days later, appellant railroads filed suit in the United States District Court for the District of Colorado seeking to have set aside the March 15, 1965, order of Division 3; and within the next month the appellant trucking companies and associations and the appellant Freight Forwarders Institute filed their complaints in intervention.

Shortly thereafter, on August 11, 1965, the full Commission entered its final order on the merits—the order that is under attack in this proceeding. In that order, the Commission "recalled" the case from Division 3, "vacated and set aside" Division 3's order of May 28, 1965 denying the petitions for reconsideration, "reopened" the case "for reconsideration on the present record," and disposed of the case with the following single sentence: "*It is further ordered,* Upon reconsideration, that the action taken by Division 3 in its order dated March 15, 1965, be, and it is hereby, affirmed" (R. 303-304).

Appellants' complaints were, accordingly, amended to seek relief from this final order of the full Commission (R. 371-372, 386-387, 390-391, 397).

9. *The District Court's decision.* On April 11, 1966, the District Court issued its judgment upholding the Commission (R. 417). As the Court interpreted the Commission's order, the Commission had refrained from deciding any question relating to the anti-competitive character of the transaction or the acquisition of "control" of REA by

Greyhound—although, as we have indicated (*supra*, p. 21), the pleadings before the Commission on the petitions for rehearing disclosed that all parties agreed that Division 3 *had* held that the 20% acquisition would not result in such a "control" relationship. The court held that, while in an appropriate case such Clayton Act and "control" questions should be considered in a section 20a(2) proceeding, in this particular case the Commission "took the proper course" because all of the relevant facts would not be known until expiration of Greyhound's 60-day offer to purchase an additional 1,000,000 shares of REA stock. Moreover, as to the question whether the Commission's order adequately set forth the grounds for the decision, the Court held that the order "is clear and understandable and presents an adequate basis for judicial review" (R. 416).

Summary of Argument

A. First, the Commission should not have approved the stock transaction without considering the probable Clayton Act violation disclosed by the record.

1. The proposed transaction, so far as the record discloses, would probably violate section 7 of the Clayton Act. Acquisition of a minority stock interest may violate that provision. *E.g., United States* v. *DuPont & Co.*, 353 U.S. 586. Moreover, it is probable that REA and Greyhound together dominate an identifiable "line of commerce"—the transportation of express. "The Commission has consistently recognized certain fundamental differences between express service and ordinary freight service." *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 135 (1952). Those differences in the main have to do with expedited delivery. See decisions cited *infra*, pp. 32-33. And, as to express service, the record indicates that a hear-

ing would probably establish that REA is the first-ranking carrier and Greyhound the second, and that together they dominate the market.

Given this market position, the other facts of record establish a *prima facie* violation. Greyhound started out to secure a majority stock interest in REA and still plans to do so if the opposition of a few REA stockholders abates. In the meantime, Greyhound believes that a 20% stock interest and a 20% representation on REA's board of directors will serve its purpose, since that purpose is shared by REA management, the majority of REA directors, and the holders of over 80% of REA's stock. And that purpose is to effect a consolidation of REA and Greyhound express activities. Such an elimination of competition will impair the opportunity of third party express carriers to compete with Greyhound for REA business, with REA for Greyhound business, and with both of them for the patronage of the public. The impact upon the motor bus competitors of Greyhound would probably be particularly severe, since the record indicates that the profitability of many of their passenger routes is dependent upon express revenue.

2. In the section 20a(2) proceeding, the Commission was obliged by virtue of the "public interest" and "lawful object" standards of the statute to consider the probable anticompetitive impact of the proposed transaction. Similar terms in similar statutes have uniformly been construed to require consideration of the basic policies of the antitrust laws. See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67; *California* v. *Federal Power Commission*, 369 U.S. 482, 484-485. Moreover, while the legislative history of section 20a(2) indicates that the Congress' primary concern was to prevent fiscal manipulation, nothing in that legislative history suggests that the Congress intended that the broad terms it employed—"public interest" and "lawful object"

—be given less than their normal meaning. Finally, to read the statute restrictively, so that the Commission could approve a securities transaction notwithstanding an apparent section 7 Clayton Act violation, would be to subvert two other statutory provisions—section 11 of the Clayton Act, which requires the Commission to enforce section 7 against carriers, and section 16 of the Clayton Act, which disables private persons from securing judicial injunctive relief respecting transactions that are within the Commission's Clayton Act jurisdiction.

3. Even if the terms of section 20a(2) were not broad enough in themselves to require consideration of the anti-competitive features of the proposed transaction, the Commission, by virtue of its obligation under section 11 of the Clayton Act to enforce section 7, was not free to ignore an apparent violation that was disclosed in the course of the section 20a(2) proceeding. Otherwise the Commission's section 20a(2) approval would be an instrument for the violation of another statute it is required to enforce.

4. The possible results of Greyhound's 60-day offer to purchase up to an additional 1,000,000 shares of REA stock did not make it premature to consider the section 7 question in the section 20a(2) proceeding. In the first place, it is doubtful that the Commission could in any circumstances approve a transaction that would probably violate section 7, since section 11 of the Clayton Act obliges the Commission in mandatory terms to proceed promptly against such violations. In the second place, if the Commission has any discretion in this respect, surely the circumstances would have to be compelling to warrant bypassing the section 7 issue, and there are no such circumstances here. If the Commission thought it preferable to know the results of the 60-day offer before conducting a hearing, it could have

denied section 20a(2) approval on the ground that the "public interest" and "lawful object" standards were not met on the record as made, but that REA could reapply if the parties reformed their contract so that the 60-day offer would expire prior to the Commission's action under section 20a(2). On the other hand, the price of ignoring the section 7 question in the section 20a(2) hearing may be the infliction of substantial competitive damage, since even if the Commission ultimately were to conduct some proceeding in which the anticompetitive impact of the transaction would be considered there would still be a substantial period of time in which the intercorporate relationship would be in effect. In this connection, the vulnerability of the motor bus competitors of Greyhound is particularly relevant.

Moreover, no possible outcome of the 60-day offer could eliminate the probability of a section 7 violation. Even if 1,000,000 shares were offered to Greyhound and the appellant minority railroads were to purchase those shares by exercising their prior rights (thereby giving them as a group slightly less than 50% of the stock), Greyhound's 20% interest would probably nonetheless violate section 7 in view of Greyhound's position on REA's board, together with its ultimate purpose of acquiring control. The leading relevant decisions are *Briggs Manufacturing Company* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960), *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958), and *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953), *aff'd* 206 F.2d 738 (2d Cir. 1953), in all of which acquisitions of about 20% interests were held to violate section 7 despite the fact that the majority interests were vigorously opposed to the acquisition.

Finally, upon the termination of the section 20a(2) proceeding, appellants may be without an enforcible right to secure adjudication of the section 7 question, since section 16 of the Clayton Act bars private injunctive relief respecting cases within the Commission's jurisdiction.

B. The Commission erred in dealing with the section 5 "control" question. While the lower court held that the Commission did not make any ruling respecting the contention that the 20% transaction would give Greyhound "control" of REA and hence would be illegal absent Commission approval after a section 5 proceeding, Division 3's order clearly held that there would not be such "control." That determination was in error under the rule established by this Court that, under section 5, the term "acquire control" includes the establishment of any relationship, formal or informal, that "accomplish[es] a significant increase in the power of one [company] over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease[.]" *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169.

If, however, our reading of the order is incorrect, and the Commission made no section 5 determination, then it erred for essentially the same reasons set forth above respecting its bypassing of the section 7 issue.

C. The order does not comply with section 8(b) of the Administrative Procedure Act, for it does not set forth with adequate clarity the grounds supporting the decision. The final order of the full Commission contains no discussion whatever, and is plainly invalid under section 8(b). But even if it be thought that the Commission intended to

adopt the prior order of Division 3, the outcome should be the same, since that order is hopelessly obscure. As to section 5, at one point the Division said it would not be "appropriate" to make a determination, but at another point it made such a determination. As to section 7, the Division said only that an investigation would "not be appropriate at this time." The Division did not suggest *why* it would not be appropriate—whether it wished to await the outcome of the 60-day offer, whether it believed section 7 questions were outside the scope of a section 20a(2) proceeding, whether it wished to see what particular plans of coordination were adopted by REA and Greyhound, whether it thought that the record did not suggest a section 7 violation, whether it believed that section 20a(2) approval would immunize the transaction, whether it thought the administrative burden would be too great at the moment, or whether it had some wholly unrelated reason. In short, the Commission "sheltered behind uncritical generalities or such looseness of expression as to make it essentially impossible for [the courts] to determine what really lay behind the conclusions. . . ." *Automatic Canteen Co.* v. *F.T.C.* 346 U.S. 61, 81.

Argument

Before analyzing in detail the legal issues raised in this appeal, we sketch at this point the general contours of the case.

Our argument in brief is as follows: First, we say that the Commission could not approve the proposed stock acquisition while ignoring the facts of record that established the probability of a violation of section 7 of the Clayton Act. The Commission's obligation to consider section 7 issues in a section 20a(2) stock issuance proceeding arises by virtue of the "public interest" and "lawful object" standards of section 20a(2); and that obligation is underscored by the Commission's responsibility under section 11 of the Clayton Act, 15 U.S.C. 21, to enforce section 7 of that Act against carriers, as well as by the disability of private parties, because of section 16 of the Clayton Act, 15 U.S.C. 26, to secure judicial injunctive relief respecting transactions falling within the Commission's Clayton Act jurisdiction.

Our second contention is similar: The Commission could not approve the transaction as in the "public interest" and for a "lawful object" without determining whether it would result in an acquisition of "control" illegal under section 5 of the Interstate Commerce Act. However, analysis of the section 5 question is complicated by virtue of the character of Division 3's March 15th order, in which at one point the Division held that "control" would not result but at another held that it was "premature" to consider questions of control. To the extent that the Commission did determine that there would be no violation of section 5, our position is that the determination was not supported by the record.

Our third contention is that the Commission failed to explain adequately the basis for its action. As we have indicated, the final order by the full Commission gave no

reason whatever for affirming the action of Division 3; and even if it be assumed that the Commission, without saying so, adopted the discussion contained in Division 3's March 15th order, analysis is not advanced because that order itself is sorely deficient. As to section 5, as we have indicated, the Division at one point ruled on the merits and at another refrained from ruling; and as to section 7 all that one can tell is that Division 3 believed it would "not be appropriate at this time" to consider the issue.

The lower court thought that the Division's decision to bypass the section 7 issue was grounded exclusively upon a belief that it would not be desirable to resolve that issue prior to the expiration of Greyhound's 60-day offer to purchase an additional 1,000,000 shares of REA stock. But the phrase "not be appropriate at this time" could just as easily have reflected the Division's belief that, as REA had argued, the stock acquisition itself could not violate section 7 and that the Commission should wait to see if any anti-competitive agreements would actually be made. Or the Division might also have meant that, as REA also had argued, section 7 questions are beyond the scope of a section 20a(2) proceeding and should be postponed to a Clayton Act proceeding.

While these alternative interpretations of Division 3's order do not by any means fully catalogue the possible interpretations of that order—much less of the full Commission's order—they illustrate how this sort of default by an agency in explaining its action impedes judicial review.

If we are correct in our view that the Commission's order is fatally defective because of its ambiguity, presumably we would only be obliged to demonstrate the invalidity of one of the possible constructions of the order to secure a remand to the Commission for clarification. However, we believe that there is no conceivable ground upon which the

Commission's action could be sustained, and that the case should be remanded either for denial of the REA application or for an evidentiary hearing. Accordingly, in the following portions of our brief we discuss each of the rationales that has, by one party or another and at one time or another, been suggested as a possible basis for the Commission's action both as to the section 7 and as to the section 5 issues.

A. *The Commission Erred In Refusing To Consider The Impact Of The Proposed Transaction Upon Competition.*

In this part of our brief, we show that the record before the Commission disclosed a probable section 7 Clayton Act violation and that in such circumstances the Commission was obliged to consider the section 7 question in the section 20a(2) proceeding.

1. *The probable anti-competitive impact of the REA-Greyhound Transaction.* As we have noted (*supra,* pp. 17, 21), REA argued to the Commision that the stock acquisition standing alone would not violate section 7 of the Clayton Act, and that, if any anti-competitive actions were taken by REA and Greyhound in the wake of the acquisition, either the Commission or the Justice Department could institute a Clayton Act proceeding. Conceivably Division 3 adopted this view in ruling that consideration of the section 7 issue would not be "appropriate." But the fact is that, as the Justice Department asserted in the Commission proceedings, the record "place[d] before the Commission serious questions under section 7 of the Clayton Act" (*supra,* p. 10).

First, the type of transaction—acquisition by one company of a minority stock interest in another—is within the "whole or any part of the stock" phrase of section 7. See *United States* v. *Du Pont & Co.,* 353 U.S. 586 (23% stock

interest); *Briggs Manufacturing Co.* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960) (22% interest); *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958) (23% interest); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953) (24% interest).

Second, it appears likely that Greyhound and REA dominate an identifiable "line of commerce"—the transportation of express. Protestants alleged before the Commission in substance that express transportation was the relevant market (*supra*, pp. 8-10, 20-21), and the Commission did not find to the contrary. This is hardly surprising, since "[t]he Commission has consistently recognized certain fundamental differences between express service and ordinary freight service. . . ." *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 135 (1952).[10] Traditionally, express service has been differentiated from other types of transportation primarily in terms of expedited delivery. The service, which has generally been confined to relatively small packages, normally commands a premium price and therefore is normally employed for items of more than ordinary value.[11] See, *e.g.*, *Coordination of Motor Transportation*, 182 I.C.C. 263, 348 (1932); *San Francisco Whole-*

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[10] Thus the Commission issues certificates in terms of express carriage and forbids both REA and motor carriers whose certificates limit them to express service from engaging in non-express carriage. See, *e.g.*, *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131 (1952), 63 M.C.C. 573 (1955); *Railway Express Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962), *aff'd sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328, 332 (D. Mass. 1963), *aff'd*, 376 U.S. 514; *Mistletoe Exp. Service Extension—Texas*, 61 M.C.C. 737, 744-745 (1953); *Railway Express Agency, Inc., Ext.—Durant-Kosciusko*, 34 M.C.C. 111, 114 (1942); *Railway Express Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363, 371 (1941).

[11] It is true that REA has recently entered the field of relatively large

sale Dairy Produce Exc. v. *American Ry. Exp. Co.*, 78 I.C.C. 737, 740 (1923); *R.R. Commissioners of Florida* v. *Southern Express Co.*, 44 I.C.C. 645, 647 (1917); *Davies Spur, Wash., Express Rates*, 43 I.C.C. 143, 146 (1917); *Kindel* v. *Adams Express Co.*, 13 I.C.C. 475 (1908). Thus, while no final conclusion respecting definition of market can be made without a hearing, surely there is every reason to believe that the express market is sufficiently distinctive to be the relevant market for purposes of appraising the probable anti-competitive impact of the proposed transaction.

As to the share of this market controlled by REA and Greyhound, once again there is no Commission finding because the Commission refused to explore the section 7 question. However, it was alleged in the Commission proceeding that REA and Greyhound are respectively the first and second ranking carriers of express (*supra*, pp. 8-10, 20-21); and, of course, the Commission knew this to be true, as does anyone familiar with the transportation industry. Moreover, data subject to judicial notice, and brought to the attention of the lower court, suggest that REA has a virtual monopoly of express traffic, with Greyhound its only substantial competitor. Thus, the annual reports filed by carriers with the Commission indicate that in 1964 REA,

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shipments, and that in *New England Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass. 1966), *aff'd* — U.S. —, 87 Sup. Ct. 407, it was held that REA's authority to carry express is broad enough to permit the transportation of containerized freight weighing up to 3,000 pounds. But this does not, of course, mean that REA no longer considers itself primarily engaged in providing the traditional type of small package express service. As REA's President testified to the Congress in the spring of 1966, "It is not true that we are a heavy shipment carrier, like a motor carrier. We are still in small package business. Our average package weighs 30 pounds, and we have 60 percent of our business, or over 34 million shipments weighed less than 40 pounds. . . ." Hearings before the Subcommittee on Postal Rates of the Committee on Post Office and Civil Service on H.R. 12367 and related bills, p. 399.

with revenue of approximately $412,000,000, controlled about 88% of the market; Greyhound, with express revenue of about $33,000,000, had about 7%; and all other motor carriers of passengers combined, with express revenues of approximately $21,000,000, had most of the balance.[12]

Given this market dominance, it is evident that the proposed acquisition would probably violate section 7. Under *United States* v. *Philadelphia National Bank*, 374 U.S. 321, REA and Greyhound would bear a heavy burden in attempting to prove the contrary, for there the Court held that a 30% market share was "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.*, at 363, 364. See also, *e.g.*, *United States* v. *Pabst Brewing Co.*, 384 U.S. 546; *United States* v. *Von's Grocery Co.*, 384 U.S. 270.

The facts of record in this case strongly reinforce the inference that competition would be lessened. To recapitulate briefly, Greyhound began with an intention of securing a majority stock interest in REA and still harbors that purpose, but is willing to wait until the opposition of a few REA stockholders abates; in the meantime, Greyhound is

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[12] We do not represent that these figures are absolutely accurate. As we have indicated (*supra*, note 11), REA derives some of its revenue from transportation of heavy shipments rather than from traditional express transportation, so that the REA gross revenue figure used above might have to be modified accordingly. Moreover, some motor carriers of freight hold express certificates, and we were not able to locate express revenue data as to them. Finally, United States parcel post is perhaps a competitive factor, limited by relative speed of delivery, size and weight restrictions, and commodity limitations. However, the adjustments in market share that these factors might require would hardly affect the Clayton Act question. The Commission surely would not deny that REA and Greyhound overshadow all other carriers of express. At the 1966 congressional hearings referred to in note 11, *supra*, the Chairman of the Commission characterized REA as "the largest transporter of express and small shipments," *id.*, at page 468; and the Commission did not respond to our invitation in the lower court to adduce any additional figures from its files if it thought they might affect the Clayton Act analysis.

satisfied that a 20% stock interest and a 20% representation on the REA Board—which cannot be modified without Greyhound's consent—will serve its purpose, since that purpose is shared by REA management, directors, and holders of over 80% of REA's stock; and that purpose is to effect a consolidation of REA and Greyhound express activities.

Even without specification as to the type of "consolidation" envisioned, this intercorporate arrangement predictably would mute competition between REA and Greyhound, and, in view of their market strength, would impair the competitive position of others and tend toward monopoly. Moreover, the "Memorandum of Understanding" between the two companies indicates, in brief, that REA is to use Greyhound transportation, supporting services, and facilities instead of its own or that of third parties where that appears most beneficial, and that Greyhound is to do the same. That there will no longer be active competition is strikingly evidenced by the fact that the two companies contemplate using the same salesmen and sales agency. Such an elimination of competition will drastically curtail the opportunity of third party express carriers to compete with Greyhound for REA business, with REA for Greyhound business, and with both of them for the patronage of the public.

Moreover, such an impairment of the position of the competitors of REA and Greyhound would probably have an extremely serious effect. Thus, for example, the motor bus protestants alleged that the combination of REA and Greyhound express activities would make it impossible for them to maintain the existing level of their express activities, and that this in turn would cripple their passenger operations, since the profitability of many of those operations is dependent upon express revenue (*supra*, pp. 8-10, 20-21).[13]

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[13] These allegations were not countered by any party nor were they held

In sum, the circumstances disclosed by the record establish that, if the Commission based its decision upon the notion that no significant section 7 problem was presented, the Commission surely erred.

2. *The scope of section 20a(2).* Our basic position, as we have noted, is that, under the "public interest" and "lawful object" standards of section 20a(2), the Commission was not free to approve the REA-Greyhound transaction in the face of a record disclosing a serious section 7 problem. While the Commission did not state its views as to the proper scope of a section 20a(2) proceeding, it is conceivable that the Commission accepted REA's contention that under section 20a(2) it should scrutinize only the fiscal soundness of the proposed transaction and should not consider the legality of the transaction under section 7. But, as we show in this portion of our brief, such a narrow conception of the range of factors relevant to a section 20a(2) determination is not supported either by sound policy, by the language of the statute, by its legislative history, or by related precedent.

The common sense of the matter, first of all, is clear: Since the Congress has, by virtue of section 11 of the Clayton Act,

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unfounded by the Commission. Independent proof of their accuracy is available from sources of which this Court may take judicial notice. Thus, in the 1966 congressional hearings referred to in note 11, *supra* (p. 442), a Vice President of Greyhound, speaking for all intercity bus carriers, stated: "For over 30 years the intercity bus industry has been supplying a steadily increasing volume of expedited package express service, which currently accounts for about 10 percent of the total revenues of the carriers. The intercity bus industry furnishes the only means of public line-haul transport for hundreds of communities which, for economic reasons, the railroads and airlines do not serve . . . . *Much of this essential service provided by buslines particularly that for smaller communities, is noncompensatory and could not possibly be continued were it not for supplementary revenues derived from such services as package express.*" (Emphasis supplied.) Moreover, the 1965 reports filed with the Commission by appellant motor bus companies reveal that 14.33% of their gross revenue was derived from package express service, and that this sum amounted to over twice their net profit after taxes and was substantially equivalent to their net profit before taxes.

directed that the Commission "shall issue . . . a complaint" "whenever [it] shall have reason to believe" that there may be a violation of section 7 of that Act by carriers subject to its jurisdiction, it would hardly be sensible to conclude that the Congress also intended that the Commission be free to approve a securities issue that might very well violate section 7 without even considering whether there would be such a violation.

Next, the plain language of the statute—the "public interest" and "lawful object" standards—forecloses such a discordant reading of the congressional purposes reflected in section 20a(2) and section 11. Section 20a(2) is cast in the broadest terms and clearly reflects an intention to extend the Commission's responsibility to determining whether a proposed stock transaction would violate another statute the Commission is bound to enforce—section 7 of the Clayton Act.

Moreover, nothing in the legislative history of section 20a(2) detracts from this conclusion. It is true, to be sure, that the primary concern of the Congress in enacting section 20a(2) was to equip the Commission with authority to prevent fiscal manipulation; but we have not discovered a single item of legislative history evidencing a legislative purpose to restrict the Commission's inquiry to fiscal considerations—an intent that would have been quite at odds with the broad language chosen by the Congress.

Finally, both court and Commission decisions in related areas strongly support a liberal, rather than a restrictive, reading of section 20a(2). There are a number of judicial decisions under other statutory provisions involving the question whether the term "public interest" or its equivalent, when used as a standard of administrative action, requires the agency to evaluate the impact of its action upon competition. Every such decision that we have been able to discover arrives at the same conclusion: The agency may not ignore the policies of the antitrust laws.

In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, this Court established the rule that governs the Commission in a section 5 proceeding, in which the Commission must decide whether a proposed merger, consolidation, or acquisition of control is "consistent with the public interest." That rule, in brief, is that "the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." *Id.*, at 87. Thus, while the Commission is not bound under section 5 to disapprove a merger even where it has adverse effects on competition, it is not free to ignore those effects in arriving at its decision. See also, *e.g.*, *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154; *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173; *Navajo Freight Lines, Inc.* v. *United States*, 186 F. Supp. 377, 381 (D. Colo. 1960) ("The term 'public interest,' as used in § 5(2)(b), embraces the interests of competing carriers.").[14]

In *California* v. *Federal Power Comm'n*, 369 U.S. 482, this Court described in similar terms the obligation of the Federal Power Commission in passing upon merger appli-

[14] For cases in which the Commission has denied applications on the basis of adverse impact on competition, see, *e.g.*, *Wheeling & L.E.Ry. Co. control*, 254 I.C.C. 505, 511 (1943) ("the relations between [the parties] are such as to suggest, at least, a disregard for the spirit and intent of [the Clayton] Act and for the public interest it is designed to subserve"); *Illinois Greyhound Lines, Inc.—Purchase—Southern Ltd.*, 38 M.C.C. 641 (1942) (proposed purchase would effecuate a virtual monopoly); *Southwestern Greyhound Lines, Inc.—Merger*, 39 M.C.C. 721 (1944). Applying a similar approach, the Commission considers the impact on competition in passing on applications for certificate authority. See, *e.g.*, *Pan-American Bus Lines Operation*, 1 M.C.C. 190 (1936); *Mt. Hood Stages, Inc., Extension—Boise—Salt Lake City*, 44 M.C.C. 535, 548 (1945) ("In our view, it is not in the public interest that this important business should be reserved to a single carrier. Both the courts and the Commission have long recognized that reasonable competition is in the public interest.").

cations where the relevant standard is the "public convenience and necessity." The Court stated: "Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of 'public convenience and necessity' as used in § 7 of the Natural Gas Act is found in the laws of the United States." *Id.*, at 484-485. See also *City of Pittsburgh* v. *Federal Power Comm'n*, 237 F.2d 741, 754 (D.C. Cir. 1956) ("Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question of whether a particular certificate is required by the public convenience and necessity.").

As to the Federal Communications Commission, this Court has stated that, in directing the Commission to discharge its licensing authority in terms of the "public interest, convenience, or necessity," "Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraint upon commerce." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224. See also *Mansfield Journal Co.* v. *Federal Communications Comm'n*, 180 F.2d 28, 33 (D.C. Cir. 1950) ("It is certainly not in the public interest that a radio station be used to achieve monopoly."); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 ("There can be no doubt that competition is a relevant factor in weighing the public interest."). And the same rule governs the Federal Maritime Board. See *Greater Baton Rouge Port Commission* v. *United States*, 287 F.2d 86, 95 (5th Cir. 1961), *cert. den.*, 368 U.S. 985.

Our argument that "public interest" as used in section 20a(2) includes a consideration of the anticompetitive features of a proposed transaction is even stronger than in the

cited cases. In all of them except *McLean*, the agency in question had no authority—and no obligation—to enforce the antitrust provisions relevant to the proposed transactions, whereas the Interstate Commerce Commission *is* responsible for the enforcement of section 7 of the Clayton Act. Moreover, in *McLean* the Court declared an obligation on the part of the Commission to consider the anti-competitive impact of the transaction despite the fact that the Commission under section 5 could grant immunity from the antitrust laws. It would seem that, where the Commission is acting under a provision like section 20a(2) that does not empower it to grant antitrust immunity, the obligation to take the Clayton Act into account would be even clearer.[15]

As to Commission decisions under section 20a(2), we have found none squarely in point. Normally, a section 20a(2) application either is a simple matter of securities issuance without any anti-competitive overtones, or else it is coupled with a merger or acquisition application under section 5 in which event the Commission is, as we have indicated, required to explore the impact of the transaction on competition.

However, there are Commission decisions under provisions cognate to section 20a(2) that fortify our argument respecting the appropriate scope of that section. Perhaps the most significant is *Chesapeake & O. Ry. Co. Purchase*, 271 I.C.C. 5 (1948). There the Commission, in construing section 20a(12), 49 U.S.C. 20a(12), which proscribes interlocking directorates in the absence of a Commission finding that "neither public nor private interests will be adversely

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[15] In contrast to section 5(11), section 20a does not authorize the Commission to immunize transactions from the antitrust laws, and accordingly the Commission has no such power. See *California* v. *Federal Power Commission*, 369 U.S. 482. See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351; *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 470; *United States* v. *Borden Co.*, 308 U.S. 188, 198; *United States* v. *RCA*, 358 U.S. 334.

affected," held that no such finding could be made in view of the probable adverse impact of the proposal upon competition. *Id.*, at 17-19, 29, 39, 40-41, 43. As the Commission put it, the applicants "are in effect asking us to sanction . . . a violation of section 7 of the Clayton Act." *Id.*, at 39. Moreover, the Commission declared that section 20a(12) had to be read in light of section 8 of the Clayton Act, which also deals with interlocking directorates.[16]

Other related decisions are those in which the Commission has held that the competitive bidding requirements of section 10 of the Clayton Act, 15 U.S.C. 20, are relevant in passing on applications under section 20a(2) of the Interstate Commerce Act for the issuance of securities without competitive bidding. *Columbia Terminals Company—Issuance of Notes,* 40 M.C.C. 288 (1945); *Securities of Western R.R. Co.,* 145 I.C.C. 750 (1928); *Regulations Relative to Bids of Carriers,* 56 I.C.C. 847 (1920); *cf. Securities of Virginia Central Ry.,* 154 I.C.C. 437 (1929).

In sum, the Commission has applied the policy of sections 7 and 8 of the Clayton Act in a section 20a(12) proceeding and the policy of section 10 of the Clayton Act in a section 20a(2) proceeding. The notion that the policy of section 7 of the Clayton Act is not to be applied in a section 20a(2) proceeding simply cannot be squared with these prior decisions of the Commission. Nor must the Court consider whether to accept an irrational discord among these various

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[16] The facts of the *Chesapeake & O. Ry. Co.* case are markedly similar to the facts in the case at bar. The application was for permission for the C&O to exercise voting rights of the 6.2% of the stock it held in the New York Central and to permit two C&O directors to sit on the New York Central board. In terms of the purpose of the application, the C&O spoke of the "establishment of a satisfactory working relationship" and a "closer association," of "greater cooperation and coordination with respect to operating and traffic policies and other activities," of "the deterioration of the New York Central's financial and credit position," of improving "the credit ratings of the New York Central's bonds and mak[ing] it possible to refinance them at lower interest rates," and of introducing "such changes, both in traffic and operating conditions, as will be beneficial to the public interest." 271 I.C.C., at 9, 14-16, 31, 32-33.

statutory provisions because of a long-standing construction by the Commission supporting its decision, for there is none. Rather, the guiding principle should be, as stated by the Commission in *Stock of New Jersey, Indiana & Illinois R.R.*, 94 I.C.C. 727, 729 (1925), that "[i]n any application to us for authority to issue securities we are bound to measure the proposal by the test of public interest in whatever phase that interest may appear to be affected. Consequently it is especially pertinent to our inquiry that any other carrier may be affected, beneficially or adversely, by the thing proposed to be done."

3. *The Commission's obligation assuming arguendo that section 20a(2) does not by its own terms require consideration of section 7 questions.* We briefly make one further point respecting the Commission's statutory responsibilities: Even assuming that the "public interest" and "lawful object" standards of section 20a(2) were for some reason inadequate by themselves to require the Commission to inquire into the anticompetitive effect of a proposed acquisition, nonetheless the Commission abused its discretion in this case by giving section 20a(2) approval without determining whether that action could be reconciled with the Commission's obligation under section 11 of the Clayton Act to enforce section 7 of that Act. Our position comes to this: Where an agency is entrusted by the Congress with the responsibility of enforcing two statutory provisions, and where in the course of a proceeding under one it becomes evident that a violation of the other would probably result if the agency grants the authority sought, the agency may not proceed without making appropriate determinations relating to both provisions.

This principle, which seems unassailable as a matter of reason, has been applied by the Commission in the past. Thus, in *New York, Chicago & St. L. R. Co. Control*, 295 I.C.C. 131 (1955), where the applicant sought a declaratory

order that acquisition of control would not result from the applicant's ownership of 14.8% of the stock of a railroad together with election of two members of the railroad's board of directors, the Commission commenced a proceeding to determine whether the applicant had already violated either section 5 or section 7 of the Clayton Act "in order that all issues may be settled at the same time." *Id.*, at 153; see *id. at* 156-157.

The Commission has also followed this principle of coordinated enforcement of related statutory provisions by holding that, in section 5(2) acquisition or merger proceedings, it should determine whether there had already been an acquisition of control without Commission approval and hence an acquisition illegal under section 5(4). If there has been such a violation of section 5(4), the Commission normally does not grant the section 5(2) application for authorization in the absence of weighty countervailing considerations—an approach that has been approved by this Court. *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 128-129.[17]

Also relevant are those court decisions establishing the rule that a tribunal must not permit itself "to be a vehicle

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[17] See also, *e.g.*, *Lombard Bros., Inc.* v. *United States*, 226 F. Supp. 905 (D. Conn. 1964); *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 43 (1958); *Kerrville Bus Co., Inc.—Purchase—Cook and Amberson*, 50 M.C.C. 349 (1948); *L. & E. Investment Co.—Control—Sooner Freight Lines*, 50 M.C.C. 163 (1947); *Royal Blue Coaches, Inc.—Merger*, 56 M.C.C. 617 (1950); *Pacific Greyhound Lines—Control and Merger*, 56 M.C.C. 415 (1950). Nor is it without interest that, as the last of the cited decisions indicates, Greyhound is no stranger to cases involving illegal acquisition of control. See also *Greyhound Corp.—Investigation of Control—Southern Ltd.*, 45 M.C.C. 59 (1946); *Greyhound Corp.—Control—Florida Motor Lines Corp.*, 45 M.C.C. 83, 98 (1946) (dissenting opinion).

The Commission has taken a similar stance in section 5(1) proceedings where the proposed arrangement involved a discontinuance of operations that would be illegal under section 1(18) unless approved by the Commission. In such circumstances the Commission refused to pass upon the section 5(1) application until accompanied by an abandonment application. See *Escanaba & L.S. R. Co.* v. *United States*, 303 U.S. 315, 318-319.

which has for its purpose the elimination and prevention of competition." *Kobe Inc.* v. *Dempsey Pump Co.*, 198 F.2d 416, 424 (10th Cir. 1952). See also *Continental Wall Paper Co.* v. *Voight & Sons*, 212 U.S. 227, 262; *Kelly* v. *Kosuga*, 358 U.S. 516, 520. Had the Commission applied this rule in the case at bar, it would have inquired whether its action under section 20a(2) might lead to a violation of section 7 of the Clayton Act, for the Commission's section 20a(2) order was the last step, and an indispensable step, in paving the way for what the record strongly indicates will be a violation of section 7.

4. *The relevance of the 60-day Greyhound offer.* As we have indicated (*supra*, p. 23), the lower court believed that the Commission's sole ground for not passing on the section 7 question was that the facts relevant to that question might be affected by the results of Greyhound's 60-day offer to purchase up to an additional 1,000,000 shares of REA stock, and the court concluded that that ground was wholly reasonable.

The court did not indicate precisely what impact it thought the 60-day offer might have. Presumably, however, it believed that pursuant to the 60-day offer either Greyhound might obtain sufficient additional stock that a section 5 "control" proceeding would be held in which the anticompetitive aspects of the intercorporate relationship could be explored,[18] or appellant minority stockholders of REA might purchase any additional stock offered to Greyhound, thereby somehow decreasing the likelihood of a section 7 violation.[19]

Whatever might be said in favor of this theory, it is not

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[18] If Greyhound secured an additional 1,000,000 shares, it would have about 60% of the outstanding stock—1,500,000 shares out of a total of 2,499,188 (R. 3).

[19] If the appellant railroads acquired an additional 1,000,000 shares, together they would hold slightly less than 50% of the outstanding stock—1,211,752 shares out of a total of 2,499,188 (R. 40-41, 3).

available as a justification for the Commission's action in this case because the full Commission gave no reason for its order, so it is impossible to tell upon what theory it relied. And even if the full Commission had adopted Division 3's order, to impute this analysis to the Commission on the basis of Division 3's "not appropriate at this time" phrase is to read too much into those few cryptic words.

Moreover, the analysis is unsupportable. The Commission is required to withhold section 20a(2) approval unless it finds that a proposed transaction is in the "public interest." But in this case the Commission has given its approval without first considering an important issue related to the "public interest" standard. The Commission's procedure here has been aptly described and strongly condemned by this Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499. There the Commission cancelled a carrier's proposed rate reductions, "though the facts that control the validity of the reduction have yet to be determined," and determination of those facts had been "put off to an indefinite future," leaving the "carrier helpless in the interval." *Id.*, at 510. In affirming an order enjoining enforcement of the Commission's order, the Court held that it had not discharged its responsibility by its "piecemeal action" through which "[r]esponsibility was shifted from the shoulders of the present to the shoulders of the days to come." *Ibid.*

Assuming *arguendo* that the Commission may have the power in some unusual cases to grant section 20a(2) approval without first resolving all factors relevant to the "public interest" and "lawful object" standards,[20] the

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[20] It is true, of course, that the Commission has followed a somewhat analogous procedure with respect to the New York Central-Pennsylvania merger proceeding under section 5(2), in that it authorized consummation of the merger prior to making a final determination as to conditions necessary for protection of other carriers. A three-judge court, over the vigorous

relevant circumstances in this case do not warrant such an extraordinary abstention. The Commission has a statutory duty under section 11 to institute a Clayton Act proceeding "[w]henever the Commission . . . shall have reason to believe" that there is a violation of the Act, and the record before the Commission in this proceeding indicates the probability of such violation. The Commission's duty in such circumstances is clear and is not altered by the possibility of future shifts in stock interests.

This is especially true in cases such as the present one, where approval of the transaction without consideration of the section 7 question might well result in serious, and illegal, damage to competition and competitors. The

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dissent of Judge Weinfeld, refused to enjoin enforcement of the Commission order, *Erie-Lackawanna R. Co.* v. *United States*, 259 F. Supp. 964 (S.D. N.Y. 1966), and this Court recently heard arguments in expedited appeals from that order in *Baltimore & Ohio R. Co.* v. *United States*, No. 642, October Term 1966, and related cases (Nos. 680, 691, 813, 814 and 815). The opinion of the three-judge court underscores both the unprecedented character of that case and its distinction from the instant case:

> "In this truly unique case, *where there is no substantial dispute over the ultimate merits of a Commission-approved merger* and the sole significant legal issue is the propriety of consummation before the protective conditions have been completely determined, judicial responsibility is limited." 259 F. Supp., at 981 (emphasis added).

Here the ultimate merit of the Greyhound acquisition is precisely the subject of dispute, and the Commission's treatment of essential factors concerning that issue is both ambiguous and incomplete. Indeed, this case rather closely approaches what the court in *Erie-Lackawanna* may have envisioned in cautioning that,

> "[t]o be sure, what we have said would in no way cover the hypothetical case, suggested in the dissent but unlikely to be encountered in life, where the Commission approved a merger and left all conditions subject to further consideration." *Id.*, at 975.

It is not without interest, moreover, that, in the appeals in this Court from the order of the three-judge court in *Erie-Lackawanna*, the Solicitor General has opposed the "truncated" administrative procedure followed by the Commission, contending that the substantial problems created for competing carriers "must be resolved by the Commission before the Penn-Central merger is irrevocably consummated." Memorandum for the United States in Nos. 642, 680 and 691, at pp. 19, 30.

record, as we have indicated, establishes that the basic 20% transaction would probably violate section 7, and that the appellant motor bus competitors of Greyhound are especially vulnerable to the type of harm threatened by the coordination of REA and Greyhound express services. If the 60-day offer were to produce no change in the relative positions of the various stockholders, or if Greyhound's holdings were to increase, the anti-competitive threat obviously would not be diminished, but might be augmented. In such circumstances, even if the Commission were to institute a proceeding in the future under section 5 (or perhaps under section 11 of the Clayton Act), much of the damage feared by appellants might be done by the time that proceeding ran its normal, protracted course. To put it differently, the Commission's grant of section 20a(2) approval without consideration of the section 7 question forecloses the type of prophylactic relief that this Court has viewed as the most desirable remedy in dealing with probable Clayton Act violations—an order blocking the acquisition until final adjudication. See *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 606 n. 5, citing with approval *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186.

Nor does the possibility that the appellant minority railroads might acquire an additional 1,000,000 shares materially affect the situation. Together they would still not have 50% of the total stock,[21] so that even if they voted as a block there is no assurance that Greyhound's ambitions respecting express service collaboration would be thwarted. Indeed, even if stockholders opposing Greyhound were to have substantial majority control, there would in all probability still be a section 7 violation. Three leading lower court decisions so establish.

In *Briggs Manufacturing Company* v. *Crane Co.*, 185 F.

[21] See note 19, *supra*.

Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960), in *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958), and in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953), acquisitions of a 22% interest, a 23% interest, and a 24% interest, respectively, were held violative of section 7 despite the fact that the company whose stock was being acquired was vigorously opposed to the acquisition. In each of these cases, the court placed particular stress upon the desire of the acquiring company ultimately to gain a majority interest, and upon the fact that even its minority interest would enable it to place a representative upon the board of directors. "[W]ith two sympathetic representatives on the Board, Crane will have driven the wedge in its attempts to gain control of Briggs' assets." 280 F.2d, at 750.[22] See also *Chesapeake & Ohio Railway Company Purchase*, 271 I.C.C. 5 (1948) (6.2% stock interest coupled with board representation.)

Moreover, once the section 20a(2) proceeding is terminated, the appellants may be without recourse with respect to the probable section 7 violation. Of course, if Greyhound secures majority control a section 5 proceeding should be inevitable; and even if there is no change in the *status quo* as a result of the 60-day offer, appellants might ultimately be able to secure a section 5 proceeding even though it is clear that Division 3 does not agree with appellants' contention that the basic 20% interest is sufficient to confer

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[22] To the same effect: "Section 7 includes within its scope a percentage interest sufficient to elect nominees to the Board of Directors." 185 F. Supp., at 184. Placing a nominee upon the board would "limit the effectiveness of the competition." 152 F. Supp., at 394. The presence of a representative on the board "would create a situation in which Benrus would have power to discourage the vigor of competition by Hamilton and so to embarrass and impede Hamilton's management that it might well be driven to unwanted collaboration or to a merger as the least of two evils." 114 F. Supp., at 314.

"control" upon Greyhound (see *infra*, pp. 50-51). However, if minority stockholders, rather than Greyhound, were to secure substantial additional stock interests, it seems clear enough from Division 3's order that the Commission would not require a section 5 proceeding. Still, as we have indicated, there would be a section 7 violation. Nor could appellants turn to the courts, since section 16 of the Clayton Act, 15 U.S.C. 26, forecloses judicial relief where the matter is within the jurisdiction of the Commission.[23]

Nor is this a case in which the Commission's only options were either to decline to investigate the section 7 question or to risk having to conduct a second proceeding after expiration of the 60-day offer. If the Commission thought that as an administrative matter it would be preferable to know the results of the 60-day offer before examining the section 7 question, it could readily have denied section 20a(2) approval unless the parties reformed their contract so that the offer would expire prior to the Commission's section 20a(2) determination. Such a revision would simply have required the REA stockholders to decide at an earlier date whether to offer to sell the additional shares to Greyhound, and whether to exercise their first rights of refusal on any stock so offered. There is nothing in the record suggesting that this matter of timing had an important legitimate business purpose, nor is it easy to imagine what such a purpose might be. Indeed, it is possible that the aim of the parties was to secure exactly what the Commission

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[23] While appellants could request the Commission to institute a Clayton Act investigation pursuant to section 11 of that statute, we have discovered no case law suggesting that the denial of such a request would be judicially reviewable. Section 11—which also confers jurisdiction upon the Federal Trade Commission—does not authorize the filing of complaints by private parties, as do provisions such as sections 2 (discrimination), 3 (prejudice), and 5 of the Interstate Commerce Act. And in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25, this Court held that section 5 of the Federal Trade Commission Act, which is similar to section 11, "does not provide private persons with an administrative remedy for private wrongs."

ordered—approval of the establishment of the 20% relationship without scrutiny of its anticompetitive features.

Finally, it is also relevant that the Commission's orders reflect no concern about, or appreciation of, the substantial Clayton Act issue disclosed by the record. The Commission could, for example, have indicated that it was troubled by the possible anticompetitive impact of the proposed transaction, but that it wished to await the outcome of the 60-day offer; and it could have evidenced its concern by imposing protective conditions on its section 20a(2) approval, such as a relinquishment of voting rights and board representation by Greyhound pending further decision by the Commission. The Commission did nothing of the sort, but instead peremptorily brushed aside the section 7 question.

In sum, there is nothing in this case to detract from the conclusion that the Commission, which is obliged under section 20a(2) to safeguard the "public interest" and under section 11 to enforce the Clayton Act, erred in approving the REA-Greyhound transaction without considering whether it would, as the record indicated, probably violate the Clayton Act.

B. *The Commission Erred In Dealing With The Section 5 "Acquisition Of Control" Issue.*

With respect to the section 5 question, as with respect to the section 7 question, the murkiness of the Commission's order presents a threshold problem. The lower court believed that the Commission "did not decide . . . any questions relating to control or competition." (R. 416). Our view that the Commission did make a finding respecting control—a view that, as the petitions for reconsideration before the Commission indicate, was shared at that time by all parties including REA (*supra*, p. 21)—rests upon the following passages of Division 3's order:

"*It further appearing,* That interveners' opposition is directed to the possibility of control of applicant by Greyhound, through the purchase of the proposed stock issue or presently outstanding shares or otherwise, and to the anticipated combination and correlation of certain of their facilities and services;

"*It further appearing,* That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York C. & St. L. R. Co. Control,* 295 I.C.C. 703 (714); . ." (R. 200-201).

The lower court did not suggest what these paragraphs represent if not a finding respecting control, and no alternative occurs to us. At the same time, it cannot be gainsaid that an element of confusion is introduced by the prior state-

ment of the Commission that a section 5 proceeding "would not be appropriate at this time" (R. 198), together with the later statement that "nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214 . . ." (R. 201).

The only theory upon which these statements can be reconciled is that the Commission held that, on the facts of record, there would not be an acquisition of "control" by virtue of the basic 20% transaction, but that the section 5 issue could be reconsidered if the 60-day offer resulted in an increase in the REA holdings of Greyhound. If this is a correct reading of the order, the Commission did not err in the same respect that it did in connection with the section 7 issue, *i.e.*, by refusing to consider section 5 at all. But it was mistaken nonetheless, for it applied an erroneous test of "control."

It is established that the term "acquire control" in section 5(2) embraces not only the establishment of a control relationship grounded in legal status such as purchase of a majority stock interest, but also the establishment of any relationship, formal or informal, that "accomplish[es] a significant increase in the power of one [company] over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease[.]" *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169. This broad standard of "control" is grounded upon the statute itself. See section 5(4) ("control or management in a common interest . . . however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . [T]he words 'control or management' shall be construed to include the power to exercise control

or management."); section 1(3)(b) ("such reference [to 'control'] shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control").

On this test, the Court found "control" in *Alleghany* despite the fact that Alleghany owned only 10% of the stock of the New York Central. And on the same test the Court found control in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, where there was no stock ownership at all. The facts relied upon in that case to establish "control and management in a common interest" are quite relevant here, for they included the integration of the terminal facilities of the two companies, their equipment interdependence, and their coordination of trucking operations.[24]

It is clear enough that the Commission in the case at bar did not follow the *Alleghany* and *Gilbertville* standards. Rather, it viewed the case from an angle that might have been proper only if the majority stockholders, the majority of the board, and the management of REA had been opposed to Greyhound's aim to secure "control and management in a common interest." The Commission findings quoted above might be adequate in a case like *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703 (1958)—the only

[24] For other "control" situations involving little or no stock ownership, see *Hart* v. *Interstate Commerce Commission,* 226 F. Supp. 635 (D. Minn. 1964); *Buckeye Express, Inc.* v. *United States,* 14 Fed. Car. Cases ¶ 81,303 (S.D. Ohio 1960); *Lombard Bros., Inc.* v. *United States,* 226 F. Supp. 905 (D. Conn. 1964); *Greyhound Corp.—Control—Southeastern Greyhound Lines,* 57 M.C.C. 123 (1950) (10% stock interest); *Greyhound Corp.—Investigation of Control—Southern Ltd.,* 45 M.C.C. 59, 77-82 (1946).

decision cited by the Commission—where the efforts of the minority stockholder were viewed with hostility by the majority; but those findings are singularly inappropriate in the case at bar where the majority welcomes the new minority stockholder and promises to cooperate in putting that stockholder's plans for "coordination" into effect. In this connection, it is interesting to note that many of the phrases employed by the Commission respecting the status of the board minority in the case at bar were lifted practically *verbatim* from *New York C. & St. L. R. Co.*, but that the Commission conveniently failed to copy the key words—"It is extremely doubtful . . . that 2 or 3 strong directors could overcome the *unanimous opposition or hostility* of 12 or 13 directors of the caliber normally holding such positions with a major railroad." *Id.*, at 714. In the quite different circumstances of the case at bar, had the Commission dealt with the section 5 issue in terms of the *Alleghany* test whether the transaction would "accomplish a significant increase in the power of [Greyhound] over REA," the result should have been different. The Commission either would have denied the application outright on the ground that the record was ample to show that there would be an acquisition of "control," or at the least the Commission would have embarked upon a further inquiry.

If, on the other hand, our reading of the order is incorrect, and in fact the Commission did not pass on the "control" question, then the Commission erred for fundamentally the same reasons outlined above in connection with the Commission's refusal to consider the section 7 issue. An illegal acquisition of control is, we submit, relevant to the "public interest" and "lawful object" standards of section 20a(2); the record raised a substantial section 5 issue; and the Commission should have decided it before approving the transaction.

C. *The Commission's Order Is Fatally Ambiguous.*

We have already repeatedly observed that, in our view, the Commission's order is not subject to any decently certain interpretation. If we are correct, the order is invalid under section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), which requires the Commission to include in its decisions "a statement of . . . findings and conclusion, as well as the reasons or basis therefore, upon all material issues of fact, law, or discretion presented on the record. . . ." [25] That statutory provision reflects the principle, established in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94, that "the grounds upon which the administrative agency acted [must] be clearly disclosed and adequately sustained." See also *Automatic Canteen Company* v. *F.T.C.*, 346 U.S. 61, 81; *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511.

The order under review, it should be recalled, is not the order of Division 3, but the final order of the full Commission which vacated Division 3's order, reopened the case for reconsideration, and then simply stated that "the action taken by Division 3 in its order dated March 15, 1965, be, and it is hereby, affirmed" (R. 304). See *supra*, p. 22. While it is of course possible that the Commission intended, not simply to affirm the "action" of Division 3, but also to adopt its reasoning, the Commission certainly did not so state: and the Commission set forth no reasoning of its own.

But even if the Commission had adopted Division 3's order in its entirety, the Commission's action would not be saved, for that order is totally obscure.

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[25] The Act applies, of course, to the Commission. *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173, 193-194.

As to the section 7 question, as we have noted, Division 3 said simply that an investigation "would not be appropriate at this time." There is no explanation *why* the Commission so concluded—whether, as REA had argued, section 7 had no place in a section 20a(2) proceeding; whether as REA also had argued, the record did not suggest a section 7 violation; whether, as the lower court believed, the Commission wanted to await the outcome of the 60-day offer; whether the Commission wanted to await the consummation of particular working arrangements between REA and Greyhound; whether the Commission believed that section 20a(2) approval would immunize the transaction; whether the Commission thought the Justice Department, not the Commission, should worry about section 7; or because of some wholly unrelated reason.

As to the section 5 issue, the order is hardly any clearer. As we have observed (*supra*, p. 51), the Commission at one point said that a section 5 investigation would "not be appropriate at this time" and, at another point, ruled that the transaction would not violate section 5. While we have suggested that the Commission may have meant that the basic 20% transaction would not violate section 5 but that the matter could be reconsidered in the future if Greyhound acquired more REA stock, the price of thus harmonizing these apparently conflicting passages in the order is the production of a further inconsistency: Why did the Commission think it proper to pass upon the section 5 question as it related to the basic 20% transaction but not upon the section 7 question?

In sum, this is plainly a case in which the Commission has "shelter[ed] behind uncritical generalities or such looseness of expression as to make it essentially impossible for [the courts] to determine what really lay behind the conclusions. . . ." *Automatic Canteen Co.* v. *F.T.C.*, *supra*, at 81.

D. *The Hearing Question*

The lower court stated that "the main thrust of the plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing" (R. 411), and disposed of that question, so far as one can tell, on the ground that section 20a(6) leaves the question of a hearing to the discretion of the Commission. While appellants do maintain that the Commission erred in not holding a hearing, the lower court entirely misapprehended the "main thrust" of the attack on the order, for the hearing issue is distinctly collateral to the issues we have already discussed.

That is, if the lower court was correct in holding that the Commission was not obliged to consider the section 7 and section 5 issues, then it was indisputably within the Commission's discretion to pass upon the fiscal aspects of the REA proposal without a hearing. On the other hand, if the Commission was obliged, as we maintain, to deal with those issues, then the only action that it could properly have taken without a hearing would have been denial of the application on the ground that REA had not met its burden of proving that the transaction was in the "public interest" and for a "lawful object." The Commission, whether by hearing or not, certainly must assemble a record adequate to support its "public interest" and "lawful object" determinations, and the record as it exists establishes the likelihood of a section 7 and section 5(4) violation.

Conclusion

For the foregoing reasons, the case should be remanded to the Commission with instructions either to conduct a hearing on the questions respecting section 5 and respecting the anti-competitive impact of the transaction, to deny

the application without qualification on the ground that the record does not establish that the transaction would comply with the "public interest" and "lawful object" standards of section 20a(2), or to deny the application with leave for REA to reapply if it reforms its contract with Greyhound so that the outcome of the 60-day offer is fixed before the Commission acts on the section 20a(2) application.

Respectfully submitted,

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APPENDIX

STATUTES

Clayton Act, section 7, 38 Stat. 731, as amended, 15 U.S.C. 18:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate

commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

* * * * * * *

Clayton Act, section 11, 38 Stat. 734, as amended, 15 U.S.C. 21:

(a) Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in

which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may, at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

* * * * * * *

Clayton Act, section 16, 38 Stat. 737, 15 U.S.C. 26:

* * * * * * *

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 2, 3, 7 and 8 of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. . . .

* * * * * * *

Interstate Commerce Act, section 5, 25 Stat. 380, as amended, 49 U.S.C. 5:

* * * * * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicles are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it neces-

sary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad

or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to the public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

* * * * * * *

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more

carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)-(10), 304(a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a(2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a and 314 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

* * * * * * *

(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

* * * * * * *

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in the common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

* * * * * * *

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

* * * * * * *

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this

section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

* * * * * * *

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and

exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

* * * * * * *

(13) As used in paragraphs (2)-(12) of this section, inclusive, the term "carrier" means a carrier by railroad and an express company and a sleeping-car company, subject to this chapter; and a motor carrier subject to chapter 8 of this title; and a water carrier subject to chapter 12 of this title.

* * * * * * *

Interstate Commerce Act, section 20a, 41 Stat. 494, as amended, 49 U.S.C. 20a:

* * * * * * *

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * * * * *

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order mod-

ify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

* * * * * * *

Interstate Commerce Act, section 214, 49 Stat. 557, as amended, 49 U.S.C. 314:

Common or contract carriers by motor vehicle corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs (2) to (11), inclusive, of section 20a of this title (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the value of capital stock or principal amount of other securities to be issued, together with the value of capital stock and principal amount of other securities then outstanding, does not exceed $1,000,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than $200,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of capital stock having no par value, the value thereof for the purpose of this section shall be the fair market value as of the date of its issue; and in the case of capital stock having par value, the value for the purpose of this section shall be the fair market value as of the date of its issue, or the par value, whichever is the greater.

Administrative Procedure Act, section 8(b), 60 Stat. 242, 5 U.S.C. 1007(b):

Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) th appropriate rule, order, sanction, relief, or denial thereof. . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLEE RAILWAY EXPRESS AGENCY INCORPORATED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLEE RAILWAY EXPRESS AGENCY INCORPORATED

OPINIONS BELOW

The opinion of the district court (R. 405-416) is reported at 255 F. Supp. 704 (1966). The order of the Interstate Commerce Commission that is in issue appears in the Record at page 304 and the prior related orders of Division 3 of the Commission appear at pages 197 and 289.

JURISDICTION

The judgment of the district court dismissing the complaints was entered on April 11, 1966 (R. 417), and the notice of appeal to this Court was filed on May 3, 1966

(R. 418-429). Probable jurisdiction was noted on October 17, 1966, 87 Sup. Ct. 201. The jurisdiction of this Court rests on 28 U. S. C. § 1253.

QUESTION PRESENTED

Whether the Interstate Commerce Commission properly acted within its discretion in authorizing Railway Express Agency, Inc. (REA) to issue twenty percent of its stock for sale to The Greyhound Corporation (Greyhound) under Sections 20a(2) and 214 of the Interstate Commerce Act, while deferring consideration for sixty days of alleged problems of control of REA by Greyhound or by appellant railroads under Section 5(4) of the Interstate Commerce Act and alleged problems under Section 7 of the Clayton Act because the facts determinative of those issues cannot be known until the end of those sixty days.

STATUTES INVOLVED

The statutes involved, in addition to those set forth in the Appendix to Appellants' Brief, include Sections 5(8), 16(12), 14(1) and 20a(6) of the Interstate Commerce Act, 49 U. S. C. §§ 5(8), 16(12), 14(1), 20a(6), and part of Section 8 and Section 10(e) of the Administrative Procedure Act, 5 U. S. C. §§ 1007, 1009(e) each of which is set forth in Appendix A hereto.

STATEMENT

The proposed transaction under review here requires two steps to complete. Each step involves different parties, different interests and creates different problems. It was fashioned in two steps, instead of one, because of the competing interests of REA, the appellant railroads, who are stockholders of REA, and other REA stockholders (R. 83).

Step one is the issuance and sale by REA of twenty percent of its stock to Greyhound for $10 million, which the Commission has found REA urgently needs (R. 200).

Step two is a tender offer to REA's stockholders for an additional forty percent of REA's stock, which Greyhound must make and complete within sixty days after the initial sale. All of REA's present stockholders have a right of first refusal with respect to any stock tendered to Greyhound. The appellant railroads have made clear their intention to exercise their rights to prevent Greyhound from acquiring one share of stock beyond the initial twenty percent. When the appellant railroads do so they will own nearly fifty percent of REA's stock (R. 40-41, 83, 200).

REA submitted step one to the Commission for approval under Section 20a(2) of the Interstate Commerce Act, 49 U. S. C. § 20a(2) (R. 1). Appellants intervened and urged the Commission to determine immediately the consequences of both transactions under Section 20a(2) or Section 5(4) of the Interstate Commerce Act, 49 U. S. C. § 5(4) (R. 197-98). The United States also initially requested the Commission to institute a proceeding under Section 7 of the Clayton Act, 15 U. S. C. § 18 (R. 75).

The Commission approved step one under Section 20a and deferred consideration of the alleged control and competition problems until the results of the tender offer are known (R. 197-202).

We believe the Commission correctly exercised its discretion. Appellants contend that the Commission had no discretion, but that it was absolutely required to consider and resolve the consequences of both steps before it approved step one. In our view appellants have badly misconstrued the Commission's order and misstated the case and the issues presented. Therefore, a rather extensive statement is required.

The Parties

REA operates throughout the United States and in Puerto Rico and Canada. The Commission has found that "REA holds itself out to transport all commodities, in any form tendered, covered by its tariff publications . . .", *Railway Exp. Agency, Inc., Extension—Nashua, N. H.*, 91 M. C. C. 311, 315 (1962), *sustained sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass. 1963), *aff'd per curiam*, 376 U. S. 514 (1964).

Greyhound owns all of the stock of Greyhound Lines, Inc., a motor carrier of passengers and express (R. 74). It can only transport property on its passenger vehicles and is therefore limited in the size, weight, volume and character of the freight it can handle (R. 353).

The United States is the statutory defendant under 28 U. S. C. § 2322 and the Interstate Commerce Commission has intervened pursuant to 28 U. S. C. § 2323.

Appellants are five railroads, nine motor carriers of property, the national association of motor carriers and one of its conferences, the national association of freight forwarders and seventeen motor carriers of passengers.

The five railroad appellants are The Denver and Rio Grande Western Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; Southern Pacific Company; and St. Louis Southwestern Railway Company and its subsidiary, St. Louis Southwestern Railway Company of Texas, both of which are controlled by Southern Pacific Company, *St. Louis Sw. Ry. Control*, 180 I. C. C. 175, *modified*, 180 I. C. C. 710 (1932). Each railroad is a stockholder of REA and, at the commencement of this proceeding, they owned in the aggregate 211,552 shares of REA stock, or slightly more than ten percent of the stock

now outstanding (R. 41).[1] In the court below these appellants asserted that the Commission's order at issue here would permit diversion of traffic from REA to Greyhound to "the detriment of REA and some or all of its railroad stockholders" (R. 321).

Appellant, the American Trucking Associations, Inc. (ATA), "is the national organization of the trucking industry" (R. 322). Its membership comprises both regulated and non-regulated trucking companies. Appellant, the Regular Common Carrier Conference (the Conference), an affiliate of ATA, is comprised of approximately 1,600 common carriers by motor vehicles under regulation by the Commission (R. 323). Both asserted before the Commission that their members are competitive with both REA and Greyhound (R. 79).

There are also nine appellant individual motor common carriers of general commodities (R. 175-79) who alleged below that they each compete with both REA and Greyhound (R. 332).

Appellant Freight Forwarders Institute (Freight Forwarders) is an association of freight forwarders operating under permits issued by the Commission and subject to the jurisdiction of the Commission under part IV of the Interstate Commerce Act, 49 U. S. C. §§ 1001-22 (R. 329). Before the Commission, Freight Forwarders claimed that since REA "is departing more and more from its traditional role in the general scheme of transportation and is entering the domain of a hauler of general freight in volume lots as distinguished from 'express matter' " (R. 46; footnote omitted), the impact of an REA-Greyhound arrangement "on the forwarding industry would be catastrophic" (R. 45).

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[1]Since the commencement of this proceeding Southern Pacific has acquired through Southern Pacific Land Co., a subsidiary, an additional 23,355 shares.

The 17 appellant motor bus carriers each alleged below that they "are in direct competition" with both Greyhound and REA (R. 347).

REA's Corporate Structure

REA has a unique corporate structure. At the commencement of this proceeding, all of its capital stock was owned by sixty major railroads,[2] each of which has a right of first refusal with respect to all other issued and outstanding stock (R. 40-41, 83). Until recently only a railroad could be a stockholder of REA (R. 6). Under its by-laws, REA's directors are divided into four groups. Three of the groups consist of directors elected by railroad stockholders who operate in the Eastern District, the Western District and the Southern District of the United States (R. 36). The stockholders in those districts are entitled to nominate and elect seven, six and five directors, respectively (*ibid.*; App. B, p. 61).[3]

The structure of REA's Board of Directors cannot be modified, either in terms of the total number of directors, of which there are presently twenty-five, or in terms of the number elected by each group of stockholders, without an affirmative vote of the holders of two-thirds of REA's stock (R. 36; App. B, p. 71). The three railroad groups have named, and will presumably continue to name, to the REA board senior executives of railroads within the respective districts (R. 146-47). Among the directors at

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[2]Some changes in the ownership of REA's stock have since occurred. Its stockholders at present are fifty-eight railroads and one noncarrier subsidiary of a railroad (see n. 1, *supra*).

[3]REA's by-laws were not submitted to the Commission in this proceeding but were incorporated therein by reference to the proceedings before the Commission in Finance Docket No. 22596 (R. 2). Accordingly, for the Court's convenience, REA's By-laws have been printed as Appendix B hereto.

the time of the Commission proceedings were officers of appellants Santa Fe and Southern Pacific (*ibid.*).

The fourth group of directors consists of seven directors at large, including two present vacancies (R. 29). After consummation of the proposed sale of 500,000 shares of stock to Greyhound, it will be entitled to name five of those directors (R. 15). Even if Greyhound purchased an additional 1 million shares of REA stock, through the tender offer described hereafter, and thus owned approximately sixty percent of REA's stock, Greyhound would nevertheless, under by-laws which it could not change, be able to name only five of the twenty-five directors; the railroads in the three districts would continue to name eighteen directors (R. 36).

The members of REA's Board are principally representatives of their railroad employers, from whom REA still purchases two-thirds of its transportation requirements, 80 ICC ANN. REP. 20 (1966). Plainly neither they nor REA management would be subject or responsive to the usual influence exerted by a major stockholder.

REA's Efforts To Become Independent And Its Financial Needs

From its organization in 1929, see *Securities and Acquisition of Control of Railway Exp. Agency, Inc.*, 150 I. C. C. 423 (1929), until its recent reorganization, REA was operated as an entirely closed, nonprofit service organization. Under a pooling agreement approved by the Commission (*ibid.*), the railroads provided REA with transportation services and shared any profits or loss realized from its operations.

In 1959, REA was pushed to the brink of liquidation by the threatened withdrawal of a large eastern railroad

from the pooling agreement, *Express Contract, 1959,* 308 I. C. C. 545, 546 (1959). There were indications that if that threat were carried out, other eastern carriers would follow the example, which would result in the dissolution of REA, *ibid.* The threatened withdrawals reflected the mounting deficits incurred by railroads from express operations, *ibid.* In order to avoid liquidation of REA, a new agreement was devised by REA and assented to by all but one of the express carrying railroads.[4]

That agreement, which was approved by the Commission, *id.* at 551, resulted in two basic changes in REA's status. First, it set in motion a procedure whereby, on July 1, 1961, REA was placed on a normal profit and loss basis in order to provide the incentive for a more efficient and economic operation, *id.* at 549-50. Second, the agreement eliminated the restrictions on REA's utilization of carriers other than railroads and imposed upon it the obligation "to conduct the express transportation business efficiently and economically using such routes and modes of transportation as in the judgment of the Express Agency shall be most advantageous in achieving such objective", *id.* at 547. Thus, the 1959 contract started REA on the way toward some measure of independence of the railroads, *cf.* 80 ICC ANN. REP. 22 (1966).

In 1963, the corporate structure of REA was further modified, with the approval of the Commission, *Railway Express Agency, Inc., Stock,* Finance Docket No. 22349, to make it possible to raise much needed equity capital and thus to achieve a measure of economic viability and independence. The provision in its by-laws that only railroads could be stockholders was eliminated, thereby for the first time opening the possibility of a broader base of stock

[4] This is the agreement by which REA's operations are now governed (R. 34).

ownership (R. 6).[5] To facilitate that purpose the 1,000 outstanding shares of REA stock were reclassified into 2,076,000. However, all of those shares are subject to a right of first refusal on the part of each of REA's then current stockholders (R. 83).[6] At the same time, 500,000 additional shares were authorized but not issued (R. 6). Unlike the issued shares, sale of that block of stock is not restricted by the right of first refusal (R. 83). However, those shares may be issued only with the consent of the holders of two-thirds of REA's outstanding stock (R. 27).

The change from a service organization to an independent operator produced an immediate need for terminal and operating equipment acquisitions (R. 34). Because of its historical method of operation, REA's retained earnings do not provide sufficient funds to permit it to complete these essential but long deferred capital acquisitions—acquisitions which are crucial to its ability to continue to compete effectively (R. 6, 34). Thus, for the six-month period ending June 30, 1964, on revenues of $200 million, REA had net income of less than $1 million, or one half of one percent of revenues (R. 12). As of that date, it had long-term debt outstanding of over $60 million[7] against an equity (common stock at par value plus corporate surplus) of $10.5 million, or a debt-equity ratio of nearly six to one (R. 11). Moreover, the completion by REA of the terminal

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[5]One of the purposes of the proposed transaction, as set forth in REA's application to the Commission, is "broadening the ownership of [REA's] capital stock" (R. 5).

[6]This information was, of course, known to the Commission, which had approved the stock split in Finance Docket No. 22349. It was therefore unnecessary for REA to describe it in its application and such earlier proceeding was merely referred to (R. 6).

[7]Composed of (R. 11),

Advances from stockholders	$27,637,054
Notes payable	8,468,000
Equipment obligations	24,281,743
Total	$60,386,797

improvement and equipment acquisition program, which it was forced to launch by the change in its relationship with the railroads, requires an expenditure of almost $40 million (R. 6, 13-14). Clearly, REA must obtain outside debt financing. In order to do so, it must increase its equity base and thereby reduce its debt-equity ratio sufficiently to make it attractive to lenders (R. 6).

The Proposed Transactions between Greyhound, REA and REA's Stockholders

In 1964, Greyhound provided the opportunity for REA to obtain the needed equity. At first, Greyhound proposed to acquire a controlling block of the outstanding stock (R. 82). That offer was directed to REA's shareholders and contemplated Greyhound's purchase from them of at least sixty-seven percent of the outstanding stock (R. 99-100). Greyhound intended to retain at least fifty-one percent and to make sixteen percent of the stock available for purchase by the major airlines (R. 94). Greyhound agreed that, if it was successful in acquiring the requisite shares, it would "finance its pro rata share of the capital requirements of REA" (R. 96). That offer stipulated that the "final transaction must be approved by the Interstate Commerce Commission" (R. 100). However, that approach, and submission to the Commission of a proposed final transaction, was successfully blocked by certain REA stockholders including appellant railroads, who made clear their intention to exercise their right of first refusal with respect to all issued stock (R. 83).

Because of the opposition of appellant railroads, the parties then turned to consideration of the type of transaction proposed here. REA could sell the 500,000 shares of unissued stock with the consent of two-thirds of its stockholders and without triggering a right of first refusal with

respect to those shares (R. 83). The cash REA would obtain by selling those shares would enable REA to make necessary capital expenditures (*ibid.*). However, the sale of the unissued stock alone, which also would have been a final transaction, was not satisfactory to some of REA's stockholders who wished to sell their stock (*ibid.*). Those stockholders insisted that Greyhound also make an offer to the REA stockholders to purchase at least part of the issued stock (*ibid.*). That offer would, of course, trigger the right of first refusal with respect to the issued stock, but the stockholders who desired to sell would have a buyer, either in Greyhound or in one of the appellant railroads (*ibid.*).[8]

Hence the present two-step proposal was evolved, and approved by REA's stockholders in October 1964 (R. 84). Greyhound will purchase at $20 per share the 500,000 unissued shares which are not subject to the right of first refusal (R. 84, 115-116). REA will thus receive $10 million. Immediately following the consummation of that sale, Greyhound must make a tender offer to REA's stockholders, good for sixty days, to purchase 1 million of the presently outstanding shares at the same price of $20 per share (R. 84, 116). That offer, which was included in the proposal at the request of REA stockholders (R.

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[8]Significantly, Greyhound's proposal to purchase the 500,000 shares of unissued stock from REA at $16 per share and to make a tender offer to REA's stockholders for 749,594 shares (which together would give Greyhound fifty percent of REA's outstanding stock, R. 111, was rejected by REA because

> ". . . certain of the REA stockholders expressed an intention to prevent Greyhound from acquiring any shares in addition to the 500,000 shares to be acquired from REA and insisted that it was unfair to require them to pay $25 a share on the exercise of their right of first refusal when Greyhound was purchasing shares from REA at about the same time at $16 a share." (R. 84)

83), will create a market for any stockholders who may wish to sell their holdings.

There are at least three logically possible responses to that offer:

(1) All of REA's stockholders may reject Greyhound's tender offer. That result is highly unlikely since the holders of at least 900,000 shares have already announced their intention to sell (R. 113). However, in that unlikely event, Greyhound would remain the owner of 500,000 shares, or twenty percent, of REA's stock.

(2) Up to 1 million shares of REA stock may be tendered to Greyhound and all of REA's stockholders may decline to exercise their rights of first refusal with respect to some of or all such shares. Again, that result also seems most improbable since the appellant railroads have already made clear their intention to exercise their rights of first refusal (R. 200). However, if the appellants should later change their position and no other railroad exercised its right of first refusal, Greyhound would then become the owner of between one and 1 million additional shares of REA stock.

(3) Up to 1 million shares of REA stock may be tendered to Greyhound, but one or more of REA's own shareholders may exercise their right of first refusal with respect to such shares. Greyhound would then remain the owner of 500,000 shares, but the shareholdings of one or more of REA's present stockholders would be greatly increased.

The history of negotiations between Greyhound and REA, and the position taken by the railroad appellants, strongly indicate that the third possibility is the most prob-

able. Greyhound was told by appellant railroads "that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders" (R. 200). If the third possibility does occur, although Greyhound's stockholdings would be unchanged, the position of Greyhound and the railroad appellants, or other railroad stockholders, with respect to REA will be substantially different than after the sale of the 500,000 shares to Greyhound.

The present proposal also allows Greyhound to name five of REA's twenty-five directors (R. 151). Because of the By-law restrictions described above, which may not be changed without an affirmative vote of two-thirds of the stockholders (*supra*, p. 6), Greyhound would not have the right to name more than five directors even if it obtained sixty percent of REA's stock (R. 36, 90-91).

In addition the proposal provides that the REA Board shall

> ". . . adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage" (R. 15).

In that connection, appellants have placed great weight upon a "Memorandum of Understanding" between an officer of REA and an officer of Greyhound (R. 149), characterizing it as a "blueprint for the elimination of competition", Appellants' Brief, p. 13.[9] The memorandum, which

[9]Appellants find it necessary persistently to distort the language of that memorandum. In their purported summarization of it, Appellants' Brief, p. 13 n. 7, appellants twist its meaning as they did in the Jurisdictional Statement, p. 7 n. 8, by, for example, substituting the

was based on a two and one-half day conference (R. 89), sets forth only the potential benefits which might be realized if certain activities of REA and Greyhound were consolidated. It was prepared at a time when the proposal under consideration was the acquisition of at least fifty-one percent of REA's stock by Greyhound and provides that its conclusions are dependent to some degree on the percentage of REA's stock owned by Greyhound (R. 89, 149). The feasibility and practicability of such consolidations have never been explored (R. 89).[10] Under the terms of the proposal, REA is not committed to consolidate any part of its operations; it is committed only to consider "seriously" the merits of any lawful and feasible plans which may subsequently be developed (R. 15). As the district court found, the proposal "commits REA only to serious consideration. The effect will depend upon the outcome of the offer to purchase the 1,000,000 shares and the subsequent actions of the REA Board" (R. 413).

Proceedings Before the Commission

(a) REA's Application Under Section 20a

On October 7, 1964, REA filed with the Commission an application for authority, pursuant to Sections 20a and

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verb "would" where the memorandum simply says "could". Thus, the memorandum suggests that Greyhound "could absorb" service and maintenance work on REA equipment in certain locations (R. 151); appellants' "summarization" states that Greyhound "would take over" such work (n. 7 ¶ 2). The memorandum indicates that Greyhound's solicitation force "could be eliminated" and the service performed by REA (R. 152); appellants "summarize" that statement by asserting that the two companies "would use" the same forces (n. 7, ¶ 4). Similarly, the memorandum suggests only what could happen "if REA would perform the terminal services other than loading and unloading of buses . . ." (R. 150; emphasis added); appellants' quotation of that statement carefully omits the "if" (n. 7 ¶ 1).

[10] Indeed, the memorandum itself states that time limitations made necessary field studies impossible (R. 149).

214 of the Interstate Commerce Act, 49 U. S. C. §§ 20a, 314,[11] to issue the 500,000 authorized but unissued shares to be sold to Greyhound. In that application, REA described at length the terms upon which it proposed to sell those shares to Greyhound (R. 1-9). It attached copies of its current balance sheet and income statement, the agreement with Greyhound and the relevant Board resolutions and minutes of the stockholders' meeting (R. 11-31). REA stated that the primary purpose to which the proceeds of the issue would be devoted was the improvement of its debt-equity ratio to make possible needed financing and improvements (R. 5).

On October 20, 1964, pursuant to its duty to investigate under Section 20a(2), 49 U. S. C. § 20a(2), the Commission forwarded an Information Request to REA, seeking detailed information as to the negotiations and proposed sale to Greyhound and the effect of the transaction on REA. The information requested was furnished to the Commission by REA on November 16, 1964 (R. 82-158).

The facts which REA furnished to the Commission included all of the information regarding the negotiations with Greyhound set forth above. Those facts were not disputed before the Commission or the court below. That lack of controversy is particularly significant because two of the appellants here—Southern Pacific and Santa Fe—had representatives on the board of REA during the course of negotiations with Greyhound. Those representatives were not only privy to all of the transactions involved but were actively engaged in blocking Greyhound (R. 108). Indeed, the blocking position adopted

[11] Section 214 makes Section 20a applicable to regulated motor carriers, with certain exceptions not material here. For convenience we shall hereafter refer to Section 20a only.

by those two appellants through the threat to exercise their rights of first refusal was the major factor governing the form of transaction ultimately evolved (R. 83). They have never contended otherwise.

(b) Positions of the Other Parties Below With Respect to REA's Application.

Appellants filed petitions to intervene before the Commission in opposition to REA's application. Each of them, except the stockholder railroads, contended that they competed with REA and Greyhound (*supra,* pp. 4-6). The essence of all the opposing petitions was that the proposed stock issue and the further possible transactions would give Greyhound control of REA in violation of Section 5 of the Act and that such control would in unspecified ways, result in harm to the intervenors (R. 43, 49, 51, 59, 62, 66, 69, 80, 174). All parties requested the Commission to hold hearings on REA's Application either under Section 20a or in a separate proceeding under Section 5 (R. 47, 49, 52, 59, 62, 64, 67, 70, 72, 81, 174).

The Department of Justice also filed a petition to intervene (R. 75). Only the Department raised an issue under Section 7 of the Clayton Act. It requested the Commission to initiate a proceeding under Section 11 of the Clayton Act, 15 U. S. C. § 21, to determine "to what extent, if any, the proposed transaction would result in effects which section 7 of the Clayton Act is intended to prevent" (R. 77).

(c) REA's Response to Those Positions.

In its reply to the petitions in opposition (R. 159), REA urged that questions of control were premature and extraneous to the matter before the Commission (R. 168) and that the petitioners would "have ample opportunity to participate in an appropriate proceeding under Section 5" (R.

164). In that connection, Greyhound filed a letter with the Commission, in which it stated that "if in the future it should appear that there is any possibility of such control by Greyhound, Greyhound will file the necessary Section 5 application."[12]

REA also urged that the issues presented by the Department of Justice relating to Section 7 of the Clayton Act be taken up "at the proper time and in logical order of sequence" (R. 167; emphasis omitted).

As to the hearings requested under Section 20a by all opposing petitioners, REA pointed out that a hearing was not required or necessary, that all information in the possession of REA relating to the proceeding before the Commission had been submitted to the Commission and that a hearing could not develop any additional pertinent information (R. 169).

(d) Attempts by Appellants To Instigate a Proceeding Under Section 5 of the Interstate Commerce Act.

Before the Commission, some of the appellants were quite convinced that REA's Section 20a application was not the proper vehicle for consideration of any alleged control issues.

Thus Transcontinental Bus System, Inc., *et al.*, filed a petition asking that REA and Greyhound "be required to . . . file . . . an application under Section 5" because "the issues pertinent under Sections 20a and 214 are limited and narrow" and

> ". . . unlike Sections 20a and 214, Section 5 does allow, and in fact makes specific provision for, the

[12]This statement was made by Greyhound in a letter to the Commission which was part of the record before the Commission and the district court, but was inadvertently omitted from the Notice of Appeal to this Court (R. 418). Accordingly, it is set forth as Appendix C hereto.

presentation of the issues necessary for a determination of the question as to whether or not Greyhound should be allow to consolidate its facilities and operations with those of R. E. A." (R. 66-67).

In addition, Southern Pacific filed with the Commission a complaint against Greyhound and REA under Section 5(7) of the Interstate Commerce Act, 49 U. S. C. § 5(7), seeking an investigation by the Commission of the alleged control of REA by Greyhound (R. 180).

In their answers to Southern Pacific's complaint, REA and Greyhound stated that they were competitors only for the business of shipping small packages of such size, weight, volume and character that they could be transported on passenger vehicles. Of this business, Greyhound handles substantially less than one percent and REA handles approximately two percent of the United States total, the remaining ninety-seven percent being handled by freight forwarders, truckers, railroads and the United States Post Office (R. 186,191).

It should be made clear that, contrary to appellants' assertion, no party ever suggested to the Commission, explicitly or "in substance", "that express transportation was the relevant market", Appellants' Brief, p. 32.

(e) The Commission's Order.

The Commission found that an investigation of the alleged violations of Sections 5 and 7 "would not be appropriate at this time" (R. 198), that a hearing was not necessary in connection with the requested authority to issue stock (*ibid.*), and that nothing contained in its order should be construed "as creating a presumption as to the action which may be taken on any . . . application under section 5" (R. 201). It then dismissed the Southern Pacific complaint

and granted REA authority under Section 20a(2) to issue not exceeding 500,000 shares of common stock to a non-railroad corporation at a price not less than $20 per share (R. 202).[13]

Several of the petitioners filed petitions for rehearing (R. 214, 223, 228, 238, 244, 257, 259). The Department of Justice, the only party requesting a proceeding under Section 7 of the Clayton Act, having apparently acquiesced in the Commission's determination that findings under Section 7 "would not be appropriate at this time", did not file a petition for rehearing, did not contest the Commission's Order in the court below, and has urged its affirmance in this Court.

Proceedings in the District Court

On June 16, 1965, appellant railroads instituted this action in the United States District Court for the District of Colorado, seeking to enjoin and set aside the Commission's order (R. 308). The gravamen of the complaint was that the Commission had abused its discretion in dismissing Southern Pacific's complaint alleging that the proposed transaction would violate Section 5(4) of the Interstate Commerce Act; that the Commission's denial of a hearing was a violation of due process of law; and that the Commission's findings were deficient because made

[13]The Commission's initial order on the merits, to which we have referred above, was entered by Division 3 on March 15, 1965, and is the order in which the Commission set forth its findings and the reasons for its disposition of this proceeding (R. 197). Thereafter, the Commission, by Division 3 acting as an Appellate Division (see 49 C. F. R. § 1.101(a)(3)), entered an order dated May 28, 1965, in which it denied petitions for reconsideration filed by several petitioners after finding that they made "no showing . . . warranting reconsideration" (R. 290). The full Commission, by order dated August 11, 1965, recalled the proceedings from Division 3, vacated the order of Appellate Division 3 dated May 28, 1965, reopened the proceedings for reconsideration and upon reconsideration affirmed the "action taken by Division 3 in its order dated March 15, 1965" (R. 304-05).

without the benefit of evidence in opposition to REA's application (R. 315-16). There was no allegation in the complaint that the proposed acquisition would violate Section 7 of the Clayton Act.

Thereafter, the nonrailroad appellants intervened. Appellant Freight Forwarders alleged in its complaint that "intervening plaintiff's members are in direct competition with Railway Express Agency (REA) and with Greyhound Corporation in the movement of package freight between points in the continental United States" (R. 329). It then adopted by reference the pertinent paragraphs of the railroad plaintiffs' complaint "adding that freight forwarders in the ordinary conduct of their business compete directly with both REA and Greyhound" and that the market in which REA and Greyhound compete is the transportation of "less-than-carload (package) freight" (R. 330).

Appellant bus lines similarly adopted by reference the pertinent paragraphs from the complaint filed by the railroad plaintiffs and made no reference to Section 7 (R. 347-48), even though appellants now contend that appellant bus lines are the only parties who compete with REA and Greyhound, Appellants' Brief, p. 34.

Appellant truck lines did raise, *inter alia*, the Section 7 issue in their complaint (R. 337-38). They also alleged that

> "Each of said plaintiffs competes over one or more of its authorized routes with Railway Express Agency, Incorporated . . . and with Greyhound Corporation . . . or corporations controlled by it, in the transportation of property for hire" (R. 332).

Appellants ATA and the conference also alleged, among other things, that the Commission erred in deferring consideration of alleged issues under Section 7 (R. 327).

On April 11, 1966, the district court handed down its decision, refusing to enjoin and set aside the order of the Commission and dismissing the complaints (R. 405).

SUMMARY OF ARGUMENT

1. Appellants' basic position is predicated upon the assumption that the Commission improperly either ignored or approved, deliberately or inadvertently, the alleged unlawful control of REA by Greyhound and the effects upon competition allegedly arising out of that relationship, without giving adequate consideration to those issues. That position is in turn founded upon an unsound, forced construction of the Commission's order. The Commission made perfectly clear that it neither ignored nor approved the alleged unlawful conduct but instead held that investigation into those issues "would not be appropriate at this time" (R. 198). The Commission expressly stated, in terms which could hardly be more explicit, that nothing in its order should be construed "as a determination of any matter under any section of the act, except sections 20a and 214" (R. 201). Moreover, the Commission made it quite clear that appellants would have ample opportunity to participate in resolving the questions relating to the alleged problems of control and competition at the appropriate time (R. 201).

2. Even if it is assumed, and we do so assume *arguendo* on this appeal, that appellants' allegations before the Commission raised a serious question of control under Section 5 of the Interstate Commerce Act or of competitive effect under Section 7 of the Clayton Act, the Commission's decision was the most reasonable one available under the facts presented here. REA applied for author-

ity under Section 20a of the Interstate Commerce Act to issue 500,000 shares (or twenty percent) of REA's stock to be sold to Greyhound for $10 million, which REA demonstrated, and the Commission found, REA urgently needed (R. 200). That sale is the first step in a two-step transaction, devised to cope with the conflicting interest of REA, the appellant railroads and REA's other railroad stockholders. The second step requires Greyhound to make a tender offer to REA's stockholders for an additional 1 million shares (or forty percent) of REA's stock. That offer will trigger the right of first refusal on the part of REA's present stockholders, which the appellant railroads have stated they will exercise (R. 200). That tender offer will expire sixty days after the sale of the initial 500,000 shares to Greyhound. The most likely result of that tender offer, although not the only one possible, is that appellant railroads will end up with about fifty percent of REA's stock while Greyhound has twenty percent.

Three alternatives were available to the Commission. It could have instituted lengthy hearings under Section 5 of the Interstate Commerce Act and/or Section 7 of the Clayton Act, to determine whether the ownership by Greyhound of twenty percent of REA's stock for sixty days was in the public interest. Secondly, appellants now suggest for the first time that the Commission could have adopted appellants' allegations and dismissed REA's application without any proceeding of any sort. That would require REA to try to renegotiate an agreement which was almost a year in gestation and to give the appellant railroad stockholders another opportunity to prevent REA from achieving further independence of the railroads. Failure in that attempt would deprive REA of the urgently needed funds; even success would delay unreasonably REA's receipt of those

funds. The Commission followed the third alternative: it approved the 20a application and reserved consideration of the problems raised by whatever the final result of the tender offer may be until the facts are known.

3. Appellants concede "that the primary concern of the Congress in enacting Section 20a(2) was to equip the Commission with authority to prevent fiscal manipulation", Appellants' Brief, p. 37. Appellants argue, then, that a collateral purpose of that section was to require the Commission to enforce Section 5 and Section 7. That contention is rebutted by the legislative history of the Interstate Commerce Act, appellants' own contentions below, the statutory pattern, and prior judicial and administrative interpretations. We show that there is no reason at all to stretch 20a completely out of shape to accommodate the problems with which Section 5 and Section 7 are concerned.

4. The Commission acted well within its discretion in deciding to approve REA's application to issue securities under Section 20a and to postpone consideration of the alleged control and competition issues until the facts ultimately dispositive of those issues become known. In so doing, the Commission did not avoid its responsibility to enforce Section 5 and Section 7. In some circumstances, it may be appropriate for an administrative body to coordinate enforcement of different statutes by disposing of related matters concurrently; it is equally permissible for it to dispose of them seriatim.

5. Our last point shows that the district court correctly found that "the main thrust of plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing" (R. 411) and properly disposed of that argument.

ARGUMENT

THE COMMISSION'S ORDER IS CLEAR AND UNAMBIGUOUS

Near the end of their argument appellants contend that "the Commission's Order is not subject to any decently certain interpretation", Appellants' Brief, p. 55. Of more importance, the entire predicate of appellants' position is a continuing misconstruction of the Commission's Order. The thrust of appellants' argument is that the Commission improperly either ignored or approved, deliberately or inadvertently, the alleged unlawful control of REA by Greyhound and the competitive harm said to flow from that relationship. Appellants then concentrate upon the impropriety of that action. It is therefore vital at the outset of our argument not only to dispose of appellants' contention that the Order is ambiguous, but also to make clear that the Commission did not either ignore or approve the alleged unlawful conduct. It follows then that appellants' arguments of impropriety are beside the point.

Preliminarily, appellants seem to be confused as to the sequence of the Commission's orders. They seem to suggest that the first order of Division 3 on the merits, setting forth the reasons for the Commission's decision, was vacated by the full Commission and to imply that no order is outstanding which explains the Commission's action:

> "The order under review, it should be recalled is not the order of Division 3, but the final order of the full Commission which vacated Division 3's order, reopened the case for reconsideration, and then simply stated that 'the action taken by Division 3 in its order dated March 15, 1965, be, and it is hereby, affirmed' (R. 304)" Appellants' Brief, p. 55.

That statement obfuscates what the Commission did. Division 3's order of March 15, 1965, which explains fully the Commission's action, was affirmed by the full Commission in its final order of August 11, 1965; the order vacated was the order of Appellate Division 3, dated May 28, 1965, denying petitions for reconsideration. See n. 13, *supra*. Thus, the Commission order of August 11 vacated the order of Appellate Division 3 denying reconsideration of the order of March 15, granted the petitions for reconsideration, reconsidered and affirmed Division 3's order of March 15.

Appellants are also under a misapprehension as to the statutory standards by which review of the Commission's order is governed. Their contention that the Commission's order is invalid under Section 8(b) of the Administrative Procedure Act, 5 U. S. C. § 1007(b), is based upon a simple failure by appellants to read that statute in its entirety. Appellants state that Section 8(b) "requires the Commission to include in its decisions 'a statement of . . . findings and conclusions, as well as the reasons or basis therefore [*sic*], upon the material issues of fact, law, or discretion presented on the record . . .' ", Appellants' Brief, p. 55. The simple answer to that contention is that Section 8(b) is not applicable to a Commission decision under Section 20a of the Interstate Commerce Act, as in fact appellants elsewhere inadvertently concede. In relying upon Section 8(b), appellants have overlooked the first part of Section 8, which states that "in cases in which a hearing is required to be conducted in conformity with Section 1006 of this title", the provisions cited by appellants apply, 5 U. S. C. § 1007. Thus, Section 8(b) does not apply to a proceeding under Section 20a because a hearing is not required under 20a. Section 20a(6) states "the Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority." Appellants concede that "it was

indisputably within the Commission's discretion to pass upon the fiscal aspects [the 20a application] of the REA proposal without a hearing", Appellants' Brief, p. 57. That concession is certainly well founded in view of the decisions by this Court and the district court in the *Allegheny-Breswick* litigation. *Allegheny Corp.* v. *Breswick & Co.*, 353 U. S. 151, 175 (1957); *Breswick & Co.* v. *United States*, 156 F. Supp. 227, 230 (S. D. N. Y. 1957). [14]

The governing statute in this connection is Section 14(1) of the Interstate Commerce Act, 49 U. S. C. § 14(1) which provides that when the Commission makes an investigation, as it did in this proceeding, see pp. 15-16, *supra*, it shall "make a report in writing"; in which it "shall state [its] conclusions . . . together with its decision, order, or requirement in the premises". Section 14(1) requires finding of fact only in reparation cases. As we demonstrate below, the Commission's order of March 15 far exceeded the minimal requirements of that statute, *Alabama G. S. R. R.* v. *United States*, 340 U. S. 216, 227-28 (1951)

Appellants also seek to generate some preliminary confusion by suggesting that the full Commission in affirming the Order of Division 3 of March 15, 1965, created some unspecified ambiguity because "the Commission set forth no reasoning of its own", Appellants' Brief, p. 55. The effect of the full Commission's Order of August 11, 1965, affirming the Division 3 order, is simply to state that all 11 Commissioners—rather than the three Commissioners who sat on Division 3—agree that the action taken in the Order of Division 3 of March 15 is correct. Surely nothing could be less ambiguous than an affirmance without opinion. That argument is sophistry.

The core of appellants' argument of ambiguity—indeed of appellants' entire position—is that the Order of Division

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[14] That decision by the district court was not the end of the *Allegheny-Breswick* litigation, which we discuss more fully below.

3 of March 15, 1965, sanctioned what they see as probable violations of Section 5 of the Interstate Commerce Act and Section 7 of the Clayton Act either by ignoring those alleged violations or by masking approval thereof under the guise of an order under Section 20a, Appellants' Brief, pp. 3-4, 24-25.

The district court sharply disagreed, holding that the Commission did "not shut its eyes to the competitive effects" and the "Commission did not decide, and we do not decide, any questions relating to control or competition. They are for the future" (R. 415, 416). It is clear that the district court's conclusion is correct.

The first five paragraphs of the order of March 15 simply describe the pleadings and the positions of the parties (R. 197-98). The sixth paragraph announces three conclusions: (1) that the filing of a Section 5 application is permissive and may not be required (no one now suggests the contrary); (2) that a hearing is not necessary for a determination of a 20a application (which appellants now concede, Appellants' Brief, p. 57); and (3) that an investigation of whether the proposed transaction or further prospective agreements between REA and Greyhound might violate Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act "would not be appropriate at this time" (R. 198).

Paragraphs 7 through 10 of the Commission's order recite quite clearly why such investigations would not be appropriate at this time. That recitation is entirely in terms of the undisputed facts of record with respect to REA's stockholders' right of first refusal, the REA-Greyhound negotiations and agreement, including the tender offer, the composition of the REA board, and finally, in the tenth paragraph, the urgent need of REA for new equity capital (R. 198-200).

Paragraph 11 of the order describes the principal objection urged by the intervenors in opposition, namely, the possibility of control and the combination of certain facilities and services (R. 200).

Paragraph 12 then deals with the imminence of those possibilities in terms of the undisputed facts as to the position taken by appellant railroads regarding the right of first refusal, the composition and caliber of the REA Board of Directors which "under the by-laws, as amended, would not permit Greyhound to control the board" and then points out that "control or the power to control must be real and not based on conjecture or remote possibilities . . ." (R. 200-201). Appellants have subjected that paragraph to much abuse in an attempt to read into it a finding by the Commission with respect to control under Section 5 of the Act. We believe there is no such finding in that paragraph. The Commission obviously was simply reciting the reasons why it was appropriate to reserve the question of control until after the tender offer.

That reservation is made crystal clear in paragraph 13 where the Commission points out that Greyhound has acknowledged the requirements of Section 5 if "control or power to control . . . becomes imminent or apparent" and that there will be opportunity later for all parties "to interpose their opposition" to such control (R. 201). Then the Commission expressly and carefully states

> " . . . that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5 . . ." (*ibid.*).

That ultimate conclusion leaves no doubt whatever of the scope of the Commission's Order.

The fourteenth paragraph is the ultimate statutory finding and the rest of the order contains the ordering paragraphs (R. 201-02).

The district court properly concluded,

> "The Commission decided that it was not appropriate to resolve control and competition questions at this time and that the § 20a(2) standards for approval of stock issuance had been met. In our opinion the Commission order is clear and understandable and presents an adequate basis for judicial review." (R. 416)

Thus, the narrow question to be decided is whether the Commission properly exercised its discretion in authorizing REA's Section 20a application before it considered the control and competition questions under Section 5 of the Interstate Commerce Act and/or Section 7 of the Clayton Act.

II. The Commission's Decision Was the Most Reasonable One It Could Have Made Under All the Circumstances

It is not necessary to convince this Court that the Commission's decision was the best way to handle the problems presented to it. To uphold the Commission's decision we need only show that it was a reasonable exercise of discretion within the limits of the Commission's statutory authority. Administrative Procedure Act, § 10(e), 5 U. S. C. § 1009(e); *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536 (1946); *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125 (1939). However, it is useful to appraise first the desirability—almost inevitability—of the Commission's choice in terms of the available alternatives and the facts presented to the Commission. Then, in the following

sections we demonstrate that the Commission's disposition of this matter was well within the permissible limits of discretion.

The undisputed facts presented by REA in connection with its 20a application showed that the purchase by Greyhound of 500,000 shares of REA's stock was only the first step of the contemplated transaction (*supra,* pp. 11-13). The pending second step—the tender offer to be completed almost immediately after the acquistion of stock by Greyhound—made clear that the future control of REA was in considerable doubt. The consequences of the tender offer could be that Greyhound would end up with sixty percent of REA's stock, that Greyhound would have twenty percent of REA's stock and the appellant railroads almost fifty percent, or any one of an almost infinite number of other possibilities in between those two (*supra,* p. 12). The proposed two-step transaction arose in unique circumstances. The REA by-laws secured to the railroad stockholders the continuing right to select eighteen of REA's twenty-five directors. Those by-law provisions could not be changed by Greyhound even if it obtained sixty percent of the stock of REA (*supra,* p. 13). REA's directors are representatives of their own companies rather than simply directors in the ordinary sense (*supra,* p. 7).

Moreover, it was clear that the transaction had been framed in two steps because of the position of appellant railroads, who insisted that they would exercise their right of first refusal to prevent Greyhound from obtaining any of REA's issued stock, and demands of other stockholders that a market be created through the tender offer which would enable them to sell their stock either to the appellant railroads or to Greyhound (*supra,* pp. 10-11).

Finally, the Commission was convinced that REA urgently needed the $10 million which the sale of the unissued 500,000 shares of stock to Greyhound would produce (*supra*, pp. 9-10; R. 200). All of those circumstances were undisputed by any party.

On the other hand, the Commission had to consider the allegations made by appellants in their pleadings before the Commission. Those allegations were quite different there than appellants have cast them here, particularly with regard to the alleged Section 7 problem. No party, except the Department of Justice, raised any Section 7 argument before the Commission prior to the decision of Division 3 (R. 198; *supra*, p. 16).[15] Before the Commission all of the appellants claimed that they competed with REA and Greyhound and focused their attention entirely upon the possibility of control of REA by Greyround (*supra*, p. 16).

Here appellants have ignored many of their earlier allegations and have conjured up what they now contend is an appropriate "line of commerce" for measuring the alleged anti-competitive effect. That line of commerce is designated "express", Appellants' Brief, p. 32. Appellants' entirely erroneous position is based upon ancient and specifically overruled case law and a statistical analysis which cries out for repudiation. It is fallacious in the extreme, and in Appendix D hereto we demonstrate that it is not worth serious attention. Although a good deal of appellants' argument is colored by their market analysis, we do not believe that evaluation of their position, a position neither suggested to or passed upon by the Commission, is central to

[15] The only party, other than the Department of Justice, which even mentioned Section 7 to the Commission was ATA, in its petition for reconsideration. Moreover, even ATA judged the alleged Section 7 problems of sufficient triviality to merit only an oblique allusion in the body of the petition (R. 264) and citation of the statute in the prayer (R. 267).

any proper consideration of the Commission's Order. Thus, for purposes of our argument, we assume that appellants' pleadings before the Commission presented what they did not, namely, a serious question under Section 5 of the Interstate Commerce Act and/or Section 7 of the Clayton Act. We do concede that at least some question was raised before the Commission under those statutes. We accept the broader assumption *arguendo* to demonstrate that even if appellants could prove what they allege for the first time in their briefs on appeal, the Commission's decision is still correct.

With the uncontroverted facts submitted by REA and the allegations of appellants before it, the Commission had three alternatives. First, it could have ordered hearings to be held under either Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act. As appellants concede, it is not unreasonable to suggest that those proceedings would have taken at least two or three years, Jurisdictional Statement, p. 20. In the meantime, REA would have been without the money which the Commission found it urgently needed (R. 200). In addition, as the district court found, such a proceeding would have been "an exercise in futility" (R. 416). That is clearly so because the only issue which the Commission could have determined would have been whether it was a violation of Section 7 or in the public interest under Section 5 for Greyhound to own twenty percent of REA's stock under the circumstances in existence for the sixty days during which the tender offer would be pending. Obviously, the hearings would then have had to be repeated almost in their entirety after the tender offer had made clear the resulting holdings of REA stock by the railroads and Greyhound.

The second alternative which appellants suggest in their brief, but did not suggest to the Commission, is that the

Commission "could readily have denied section 20a(2) approval unless the parties reformed their contract so that the offer would expire prior to the Commission's section 20a(2) determination", Appellants' Brief, p. 49. In other words, the Commission could have adopted appellants' allegations and dismissed REA's application without any proceeding of any sort. This new suggestion would require REA to seek once again an acceptable resolution of the conflicting interests of its stockholders with no assurance that a new attempt would produce a better, or indeed as good, a result. Obviously, appellant railroads are not in favor of the sale of stock to Greyhound and would welcome another opportunity to block that transaction. Their suggestion to this Court, but not to the Commission, is that they should be given another opportunity to frustrate the sale. Surely the Commission is not required to take the risk that they would be successful in light of REA's urgent need for financing.

Appellant's suggestion that "it is possible that the aim of the parties [in framing the two-step transaction] was to secure exactly what the Commission ordered—approval of the establishment of the 20% relationship without scrutiny of its anticompetitive features", Appellants' Brief, pp. 49-50, is amazing in view of the railroad appellants' participation in framing the proposal. They at least know better. We reject the implications of that statement. REA's sole interest is to obtain $10 million for needed improvements and a measure of independence from its railroad stockholders. The interests and aims of the other parties—REA's stockholders, including appellant railroads, and Greyhound—are quite diverse and dictated the two-step approach (*supra*, pp. 10-11). Moreover, the Commission has not, as we pointed out above (*supra*, pp. 27-29) approved the relationship of Greyhound and REA; all it approved was REA's application to issue stock under Section 20a (R. 201).

Finally, there was a third alternative, which the Commission followed. It could and did approve the 20a application, the first step of the transaction, permitted the second step—the tender offer—to take place and carefully reserved to itself the right to consider and approve or disapprove, and to all parties the right to challenge, the final result of the transaction after the consequences of the tender offer become known (R. 201).

Appellants raise in essence now, for the first time, only two practical objections to the Commission's choice of that third alternative. First appellants contend in effect that if the Commission's order is allowed to stand and if the Commission after the tender offer considers the consequences thereof as it says it will, under either Section 5 or Section 7, "much of the damage feared by appellants might be done by the time that proceeding ran its normal, protracted course", Appellants' Brief, p. 47. That argument, of course, has significance only if one assumes that appellants would prevail at the end of such a protracted proceeding. That assumption is doubtful at best, but again we assume *arguendo* that it is so. Also again, a more precise analysis is necessary to view the problem accurately.

The extent of any damage pending determination of a Commission proceeding under Section 5 or Section 7, which appellants allegedly fear, would depend greatly on the outcome of the tender offer. Thus, if the outcome of the tender offer is that Greyhound is left with twenty percent of REA's stock and appellant railroads end up with fifty percent through the exercise of their right of first refusal, no injury to appellants would seem likely. If no stock is tendered to Greyhound, then Greyhound's ability to bring about competitive injury to appellants through its ownership of twenty percent of REA's stock seems at best doubtful. Finally, even if one assumes that Greyhound

will obtain sixty percent of REA's stock, the damage appellants allegedly fear need not occur at all. Clearly, the Commission under Sections 5(7), 5(8) and 16(12), 49 U. S. C. §§ 5(7), 5(8), 16(12) has ample authority to obtain interim relief to prevent continuation of any violation of Section 5 of the Interstate Commerce Act. Moreover, the Commission has similar authority under Section 11 of the Clayton Act, 15 U. S. C. § 21, to prevent any competitive injury to appellants, *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966). It must be assumed that the Commission on its own motion, or with the prodding of appellants, would exercise the power given to it in an appropriate manner.

The only other objection which the appellants raise to the alternative selected by the Commission is their claim that they have somehow been deprived of a remedy which they might otherwise have had. They state that "once the section 20a(2) proceeding is terminated, appellants may be without recourse with respect to the probable section 7 violation", Appellants' Brief, p. 48.

That argument is composed of two assumptions. First, it assumes that after the completion of the tender offer, Greyhound's ownership of REA's stock will constitute a violation of Section 7 but not of Section 5,[16] which we accept, *arguendo*. Secondly, it assumes without any conceiveable justification that the Commission will thereupon refuse to discharge its duty and enforce Section 7.

Moreover, it is perfectly clear that the Commission's action under Section 20a(2) has not affected in any way, shape or form any remedy which appellants might otherwise have had. If Greyhound had purchased twenty per-

[16]Appellants concede that they will have a remedy if Greyhound's stock ownership in REA raises a question under Section 5, Appellants' Brief, p. 48.

cent of the issued stock from REA's stockholders or if the stock had been available on the market and purchased in that manner, no approval by the Commission for that purchase would have been necessary under Section 20a. Only because Section 20a requires REA to obtain permission to "issue" the stock is the Commission called upon to act at this stage. All the remedies that appellants ever had they have now. Among those remedies are an application under Section 5(7) with the correlative interim relief, a petition similar to that filed by the Justice Department below under Sections 7 and 11 of the Clayton Act, again with interim relief available, or an action for treble damages under Section 4 of the Clayton Act, 15 U. S. C. § 15. All of those remedies appellants have now and will have if this Court affirms the Commission. They would never have had any other remedies under any other circumstances.

Thus, it seems plain to us that the Commission's selection of the third alternative was most reasonable under all the circumstances and that appellants' objections to that alternative are entirely without foundation.

The exercise of the kind of procedural discretion here brought into play is not only proper but required, if the Commission is adequately to perform the responsibilities delegated to it by Congress. Upon the termination of the tender offer, within sixty days after the initial sale is consummated, one of three factual situations will exist: (1) Greyhound will have secured up to an additional forty percent of REA stock; (2) the railroad appellants will have obtained up to an additional forty percent of REA stock; or (3) the stock ownership of REA will remain as it was upon the consummation of the initial transaction.

If the first possibility occurs, depending upon the number of additional shares acquired by Greyhound, the Commission may find that Greyhound controls REA within the meaning

of Section 5. If so, and if the Commission approves such control as being in the public interest, the transaction will be immune from the antitrust laws under Section 5(11) of the Act, 49 U. S. C. § 5(11), *Seaboard Air Line R. R.* v. *United States,* 382 U. S. 154 (1965); *Minneapolis & St. L. Ry.* v. *United States,* 361 U. S. 173 (1959); *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944).

If, as is more likely,[17] the second factual situation comes into existence, the determination of whether Greyhound is in control of REA within the meaning of Section 5 and, if Greyhound is found not to be in control, whether the ownership by Greyhound of twenty percent of REA's stock nevertheless might result in a substantial lessening of competition, is dependent upon which of REA's stockholders acquire additional shares and the number of such shares acquired. As appellants have admitted, "it would indisputably be much more difficult—and impossible if a unified group of railroads acquired the entire 1,000,000 shares—to establish that Greyhound 'controlled' REA", Appellants' Reply to Motions to Affirm, p. 14. Should the Commission find that Greyhound did not control REA within the meaning of Section 5 but that the acquisition by Greyhound of 500,000 shares of REA stock might tend substantially to lessen competition within the meaning of Section 7, the Commission has the power to deal appropriately with that problem under Section 11 of the Clayton Act.

Finally, in the unlikely event that the third possible factual situation comes into being because no present stockholder of REA tenders any stock in response to Grey-

[17]As the Commission found, Greyhound was told by "dissident railroads . . . that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad stockholders . . ." (R. 200; see also App. C, p. 74).

hound's tender offer,[18] the Commission may then consider the arguments prematurely raised by appellants with respect to control or effect upon competition. The crucial difference between the Commission's now canvassing the issues raised by appellants and doing so after the results of the tender offer become known, is that the Commission can base its resolution of those issues upon known facts, rather than upon speculation about future events.

The prudent exercise by a regulatory agency of administrative flexibility has long been recognized, and approved, by this Court as an absolute necessity if administrative agencies are expeditiously to discharge the responsibilities delegated to them. We believe the order under review here was "not only entirely appropriate but in the best tradition of effective administrative practice", *FPC* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145, 155 (1962). See also, *e.g.*, *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U. S. 378, 392 (1959); *SEC* v. *Drexel & Co.*, 348 U. S. 341, 347 (1955); *New Eng. Div. Case*, 261 U. S. 184, 201 (1923).

We now turn to an analysis of whether the action taken by the Commission was permissible under the relevant statutes.

III. The Commission Was Not Required to Resolve the Alleged Control and Competition Issues Under Section 20a(2).

> "[Appellants'] basic position . . . is that, under the 'public interest' and 'lawful objects' standards of section 20a(2), the Commission was not free

[18] It was at the insistence of REA stockholders that the tender offer provision was put into the agreement with Greyhound, which strongly indicates that at least some REA stockholders desire to dispose of their stock. *supra*, p. 11. Moreover, the REA Board was told that at least 900,000 shares would be tendered in response to Greyhound's offer (R. 113).

> to approve the REA-Greyhound transaction in the face of a record disclosing a serious section 7 problem", Appellants' Brief p. 36.

Appellants' support for that contention is to urge that similar language in other statutes requires the Interstate Commerce Commission, the Federal Power Commission and the Federal Communications Commission, in passing upon other kinds of transactions, to give effect to the policy underlying Section 7 of the Clayton Act. That argument is superficial at best and will not bear analysis. As Mr. Justice Holmes observed, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used", *Towne* v. *Eisner,* 245 U. S. 418, 425 (1918).

Turning then to an analysis of Section 20a(2), we point out again that the Commission did not "approve the REA-Greyhound transaction". The Commission approved the issuance of 500,000 shares of stock by REA. The Commission did not either ignore or approve in any way control of REA by Greyhound or any anticompetitive steps to be taken or results which may flow from the transaction. The Commission carefully reserved the right to pass on both the control and the competition issues later (R. 201). If the Commission here has either ignored the alleged anticompetitive features of the proposed transaction or sanctioned a relationship which would bring about those anticompetitive factors, appellants' argument might have some force and the cases cited by appellants—which do relate to final action taken by administrative bodies—would have some relevance here. In other words, if the Commission order under review were the final step in this proceeding, appellants' point might be well taken. The fact that the control and competition issues remain

to be considered makes appellants' contention that the Commission could not "approve the REA-Greyhound transaction in the face of a record disclosing a serious section 7 problem" entirely meaningless.

Appellants concede "that the primary concern of the Congress in enacting section 20a(2) was to equip the Commission with authority to prevent fiscal manipulation", Appellants' Brief, p. 37. Thus, appellants' contention here is, at most, that a collateral purpose of Section 20a(2) was to require the Commission to enforce Section 5 and Section 7. That collateral purpose seems most unlikely on its face and the legislative history of Section 20a(2) makes perfectly clear that no such collateral purpose was ever intended or even considered.

In 1919 the present Section 20a(2) was included in a bill to return the railroads to private ownership following the first World War, H. R. 10453, 66th Cong., 1st Sess. (1919). The design and purpose of the bill was to protect the public from financial manipulation and to insure sound financing by the railroads. In introducing the measure to the House, Congressman Esch, Chairman of the House Committee on Interstate and Foreign Commerce and sponsor of the bill, after referring to Section 20a as "the stock and bond features" of the bill, 58 CONG. REC. 8317 (1919), emphasized that "the public interest" which Section 20a(2) was intended to serve was an interest in sound financing:

> "If our bill of 1914—and perhaps of 1910, but especially of 1914—had been enacted into law, in my opinion we would not have had the shameful financial record of the Frisco, the Rock Island, the Pere Marquette, and the New Haven, had we given the commission the power we seek to give it now. Hereafter, under this bill, there shall be no issue of stocks or bonds without a certification from the

commission that they are necessary and needful in the public interest." 58 CONG. REC. 8318 (1919).

In the course of the debate on the bill, Congressman Green discussed the public's interest in not having to pay excessive railroad rates because of dividends on "watered stock" for which value had not been paid in (*id.* at 8664); Congressman Robinson emphasized the public's interest in being protected from the sale of "watered stock" itself (*id.* at 9163); and Congressman Madden summed up the purposes of Section 20a(2):

> "The Interstate Commerce Commission, under this bill, is given wide powers. It is authorized to prohibit the issuance of stocks and bonds by any road in the United States without first having all the facts presented upon which the proposed issue is to be based, so that henceforth, whatever may have been the practice in the past in that respect, this bill gives the assurance that no watered stocks on any railroad properties can be issued", 59 CONG. REC. 8833 (1920).

Similarly the "color and content" of the "lawful object" language seized upon by appellants were entirely related to the Congressional intent to prevent financial manipulation. Congressman Rayburn's remarks during the debate on the bill illustrate the view of the drafting committee:

> "Of course the credit of the railroads has been destroyed. But if we write into the law of the land a statute to the effect that before a railroad can issue new securities, before it can put them on the market, it must come before the properly constituted governmental agency, lay the full facts of its financial situation before that body, tell that body what it

intends to do with the money derived from the sale of the issue of securities, and after it has received the approval of that regulating body and it goes out and puts those securities on the market, then the Interstate Commerce Commission by this law is empowered at any time to call it to account and have it tell to that regulating body that it expended the money, the proceeds of the sale of securities, for the purposes for which it had made the application. Then we shall have railroad securities that will stand for value in the markets of this country and in the markets of all the world. . . ." 58 CONG. REC. 8376 (1919).

That the purpose of the "lawful object" language is to require disclosure of the purpose of the proceeds of the issue and to discourage manipulation of securities by insiders by compelling the issuer to state an object wholly within its corporate charter, to account for the proceeds of the issue, and to show that they were actually expended for the stated purpose is substantiated by the Commission's continuing construction since 1922. In an order of May 25, 1922, the Commission established the form and content required for applications under Section 20a(2),[10] recognizing five general lawful objects which could constitute a valid purpose of an issue: (1) acquisition of property other than equipment; (2) acquisition of equipment; (3) construction, completion, extension or improvement of facilities

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[10] *In The Matters Of (A) Applications Under Section 20a of the Interstate Commerce Act for Authority to Issue Securities or to Assume Obligations or Liability with Respect to the Securities of others, etc.*, quoted in MACVEAGH, THE TRANSPORTATION ACT OF 1920, at 489-501 (1923). Its provisions remained substantially unchanged until 1964 (see 49 C. F. R. §§ 56.1-56.6 (1963)) when they were revised and simplified, 29 Fed. Reg. 11127 (1964).

(expenditures not yet made); (4) discharge or refunding of existing obligations; and (5) reimbursement of money expended from income or from other moneys in the treasury of the applicant.

The courts have consistently held that the purposes of the "public interest" and "lawful object" requirements of Section 20a are "to maintain a sound structure for support of railroad credit to aid in developing a national transportation system" and to "protect the investing public against faulty or dishonest financing" resulting in "dissipation of railroad resources", *Chicago S. S. & S. B. R. R.* v. *United States*, 221 F. Supp. 106, 108 (N. D. Ind. 1963); *Breswick & Co.* v. *United States*, 156 F. Supp. 227, 234 n. 15 (S. D. N. Y. 1957), *rev'd on other grounds sub nom. Allegheny Corp.* v. *Breswick & Co.*, 355 U. S. 415 (1958); *Pittsburgh & W. V. Ry.* v. *ICC*, 293 Fed. 1001, 1004 (D. C. Cir. 1923), *appeal dismissed*, 266 U. S. 640 (1924); *Minneapolis St. P. & S. Ste. M. Ry.* v. *Railroad Comm'n*, 197 N. W. 352, 356-57 (Wis. 1924); see also 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 190 (1931). Our research has revealed no instance prior to this case where anyone has suggested that the Clayton Act or Section 5 is incorporated in Section 20a(2).

Appellants' only point in this connection is that the legislative history does not contain a statement that Congress did not intend to incorporate the Clayton Act or Section 5 into Section 20a(2), Appellants' Brief, p. 37. Certainly, that contention is a lame argument.

The pattern of the Transportation Act of 1920, of which both Section 5[20] and Section 20a(2) were parts, 41 Stat.

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[20]As originally enacted, Section 5 did not, as it now does, 49 U. S. C. § 5(1), specifically preclude acquisition of control of one carrier by another, 41 Stat. 480 *et seq.* (1920). It also contemplated consolidation of railroads in accordance with a master plan to be developed by the Commission, *id.* at 482, an approach which was thereafter abandoned. See *St. Joseph Paper Co.* v. *Atlantic C. L. R. R.*, 347 U. S. 298, 315-21 (1954).

456, 480, 494 (1920), also demonstrates the speciousness of appellants' arguments. Section 5, which provides for authorization by the Commission of a complete elimination of competition between two carriers through control, merger, lease, or other method of consolidation, cloaks the Commission with the power to grant immunity from the antitrust laws for an approved transaction. Section 20a(2) on the other hand, although enacted by the same Congress, provides for no such authorization or grant of immunity. Thus, under appellants' construction, the 66th Congress adopted the erratic policy of relaxing enforcement of the antitrust laws when competition was eliminated but requiring strict enforcement when lesser competitive harm might occur.

As noted above, both Southern Pacific and Transcontinental Bus System, *et al.*, recognized the limited function of Section 20a(2) (*supra*, pp. 17-18). Indeed Transcontinental Bus System, *et al.*, conceded expressly that Section 20a(2) does not allow "the presentation of the issues necessary for a determination of the question as to whether Greyhound should be allowed to consolidate its facilities and operations with those of R. E. A." (R. 66-67). That concession is clearly correct.

Section 20a(2) was set up to deal with a particular category of financial matters and to resolve those matters on their own merits expeditiously—with a hearing only if the Commission "sees fit", Interstate Commerce Act, § 20a(6), 49 U. S. C. § 20a(6). It is neither necessary nor desirable to require the Commission to discharge its duties under the Clayton Act or Section 5 through a tortured reading of the "public interest" and "lawful object" language of Section 20a.

IV. The Commission Was Not Required to Resolve the Alleged Control and Competition Issues Under Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act Prior to the Granting of REA's Section 20a Application

In extremely vague language, appellants seem to contend that the Commission erred by not holding full-scale hearings and resolving finally and completely the alleged issues of control and competition under Section 5 of the Interstate Commerce Act and Section 7 of the Clayton Act. Appellants' position as stated completely begs the issue. They summarize their conclusion thus:

> "Where an agency is entrusted by the Congress with the responsibility of enforcing two statutory provisions, and where in the course of a proceeding under one it becomes evident that a violation of the other would probably result if the agency grants the authority sought, the agency may not proceed without making appropriate determinations relating to both provisions", Appellants' Brief, p. 42.

That statement applies equally to appellants' contentions under Section 7 and Section 5. Appellants' Brief, pp. 42, 54.

If all that appellants are saying is that an agency is required to discharge its responsiblity under all of the authority granted to it, and that is all the cases cited by appellants stand for at best (Appellants' Brief, p. 44), then we are in complete agreement with them. But the last clause of appellants' statement of their position evades the whole problem, because the question here is whether the Commission's postponement of consideration of the alleged control and competition issues was an "appropriate determination". It may well be that in some cases it is appropriate and desirable for an administrative body to coordinate enforce-

ment of statutory provisions by determining to dispose of related problems concurrently. It seems to us equally permissible for an administrative body to coordinate the enforcement of related statutory provisions by passing upon related matters consecutively. Clearly if the latter procedure is permissible, discretion to choose between the two proceedings must be left to the administrative body, *cf., Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 488 (1951). Rather than meeting that contention and the reasons recited by the Commission and the district court, appellants repeatedly try to suggest that the Commission has bypassed or avoided the alleged control and competition issues for all time. The Commission's Order explicitly stated the contrary (R. 201).

The question whether the Interstate Commerce Commission may properly act upon an application under Section 20a before it resolves alleged problems of control is not a matter of first impression in this Court. In two cases, both styled *Alleghany Corp.* v. *Breswick & Co.,* this Court held "that the Commission properly exercised that jurisdiction [over Alleghany] in authorizing the issuing of stock without approving the acquisitions of control of Central", *Alleghany Corp.* v. *Breswick & Co.,* 355 U. S. 415, 421 (1958) (dissenting opinion). While it may be that this question was resolved sub silentio, we agree with the dissent that it was in fact resolved.

The Alleghany litigation arose out of a proceeding in which the Commission had granted an application by Alleghany under Section 20a, which had the effect of exempting Alleghany from the Investment Company Act of 1940, 15 U. S. C. §§ 80a-1—80a-52. The Commission had jurisdiction over Alleghany, if at all, only because Alleghany controlled the New York Central Railroad. Such control had been acquired by Alleghany without first obtaining au-

thority from the Commission under Section 5. The first time it considered the case on the merits, the district court reversed the Commission's grant of authority under Section 20a, holding that the Commission could not predicate its jurisdiction to grant such authority on control which the court found to have been illegally acquired without prior approval by the Commission under Section 5 of the Act. *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (S. D. N. Y. 1955), *rev'd sub nom. Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151 (1957).

In reversing that decision, this Court held that the Commission had jurisdiction over Alleghany so long as Alleghany exercised actual control over Central, whether such control had been approved by the Commission or not, and remanded the case for consideration of the question whether the stock issue approved by the Commission was in violation of the Act, *Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151 (1957). On remand the district court held, in language which almost seems to come from the brief of appellants in the present case, that the Commission could not properly have granted authority to issue securities unless the control question had first been resolved:

> "Under these circumstances, should authorization of the issue of stock be permitted to stand? We do not see how the adequacy of the security of the new preferred could be calculated until this question [of control] is resolved or at least considered. . . . In the absence of compelling reasons to the contrary, as to which no findings were made, authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue

without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. . . ." *Breswick & Co.* v. *United States*, 156 F. Supp. 227, 233-34 (S. D. N. Y. 1957), *rev'd sub nom. Alleghany Corp.* v. *Breswick & Co.*, 355 U. S. 415 (1958) (footnote omitted).

The court set forth the type of action which the Commission, in the court's view, should have taken to resolve the control issues under Section 5. Finally, the court held:

> "We have now recognized the Commission's jurisdiction. This unquestionably includes the power to authorize the issue of the preferred stock in question but we hold that although there might be circumstances when such action could reasonably be taken before approving the acquisition of control over the Central System, there were no findings or facts which justify such action in the present case." 156 F. Supp. at 237.

The case was again reversed by this Court:

> "PER CURIAM.
>
> "The judgment of the District Court is reversed and the case is remanded for consideration by that court of the only claim that was left open at this Court's prior disposition of this litigation, to wit, whether 'the preferred stock issue as approved by the [Interstate Commerce] Commission was in violation of the Interstate Commerce Act.' *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 175." *Alleghany Corp.* v. *Breswick & Co.*, 355 U. S. 415, 416 (1958).

On the second remand of the case, the district court affirmed the Commission's order under Section 20a. *Breswick & Co.* v. *United States,* 160 F. Supp. 754 (S. D. N. Y. 1958).

We believe the facts of the *Alleghany* case are much stronger than those in this proceeding in favor of the sort of rule appellants seek. In that case, the Commission found that Alleghany had already obtained the alleged unlawful control and no reservation was made there, as it was here, for appropriate resolution of the control problem in the immediate future, *Louisville & J. B. & R. R. Merger,* 290 I. C. C. 725 (Div. 4), *aff'd,* 295 I. C. C. 11 (1955). Moreover, the facts in *Alleghany* were all known; here the crucial facts relating to the alleged control and competition issues cannot now be determined. Even the district court in that case concluded, prior to the second remand, that there might be circumstances where a Section 20a approval would be appropriate before the acquisition of control were approved or disapproved, 156 F. Supp. at 237. Thus, we do not believe that our case stands or falls on the Alleghany decisions. We do believe that where, as here, the attempt to resolve the alleged control and competition issues would, in the words of the district court, be "an exercise in futility" (R. 416), it was proper for the Commission to authorize REA's Section 20a application and to reserve jurisdiction on the alleged control and competition issues for later determination.

V. The Hearing Question

Appellants now suggest that the district court did not understand their positions below with respect to the requirement of a hearing prior to approval of REA's stock issuance and disposed of their arguments on inadequate grounds, Appellants' Brief, p. 57. That argument is based upon a distortion of the district court's opinion and appellants' own pleadings.

Appellants now concede that "it was indisputably within the Commission's discretion to pass upon the fiscal aspects of the REA proposal without a hearing" and that "the hearing issue is distinctly collateral to the [Section 5 and Section 7] issues", Appellants' Brief, p. 57. Their contentions below were quite the opposite. For instance, in their complaint, which was adopted by other appellants (*supra*, p. 20), appellant railroads alleged that the Commission's findings were without reference to Section 5 or Section 7, "deficient in that they were made upon mere allegations in the pleadings without the benefit of evidence in opposition" (R. 316). That allegation also appeared *in haec verba* in appellant truck lines' complaint (R. 338-39). Indeed, appellants argued below that the hearing question was one of constitutional dimension (R. 316, 327, 338).

Moreover, contrary to appellants' statement that the district court disposed of the hearing question solely by reference to Section 20a(6), it is abundantly clear that the court considered that question in light also of Section 5 and Section 7. The court observed that the "main thrust" of appellants' arguments there was that a hearing was required and held that "consideration of this issue requires an analysis of the statutes upon which reliance is placed" (R. 411). In the next three succeeding paragraphs, the court reviewed seriatim the relevant provisions of Section 20a, Section 5 and Section 7 (R. 411-12). The court began the fourth succeeding paragraph with the statement, "The argument is that approval of the stock issuance may not be given without determination, after hearing," of the Section 5 and Section 7 issues (R. 412). Finally, after a full discussion of all the issues raised below by appellants, the court held that "until the facts are developed . . ., hearings on control or competitive effects are no more than an exercise in futility" (R. 416).

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

Statutes

Interstate Commerce Act, Section 5(8), 24 Stat. 380, as amended, 49 U. S. C. § 5(8):

"(8) **Jurisdiction of injunctions, etc. against violations of section or orders.** The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

Interstate Commerce Act, Section 14(1), 24 Stat. 384, as amended, 49 U. S. C. § 14(1):

"(1) Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

Interstate Commerce Act, Section 16(12), 24 Stat. 384, as amended, 49 U. S. C. § 16(12):

"(12) **Proceedings to enforce orders other than for payment of money.** If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district

court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

Interstate Commerce Act, Section 20a(6), 41 Stat. 494, as amended, 49 U. S. C. § 20a(6):

"(6) Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

Administrative Procedure Act, Section 8, 60 Stat. 242, 5 U. S. C. § 1007:

"In cases in which a hearing is required to be conducted in conformity with section 1006 of this title——

"(a) . . .

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Administrative Procedure Act, Section 10(e), 60 Stat. 243, 5 U. S. C. § 1009(e):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or

limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

APPENDIX B

RAILWAY EXPRESS AGENCY, INCORPORATED BY-LAWS.

ARTICLE I.

STOCK.

SECTION 1. The certificates of stock of the corporation shall be numbered and shall be entered in the books of the corporation as they are issued. They shall set forth the holder's name and the number of shares and shall be signed by the President or a Vice-President and the Secretary or an Assistant Secretary.

SECTION 2. Transfers of stock shall be made on the books of the corporation only by the person named in the certificate or by attorney lawfully constituted in writing and upon surrender of the certificate therefor.

SECTION 3. The Board of Directors may close the stock transfer books in their discretion for a period not exceeding forty days preceding the date of any meeting of stockholders or the date for the allotment of any rights.

SECTION 4. The corporation shall be entitled to treat the holder of record of any share or shares of stock as the holder in fact thereof and shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other person, whether or not it shall have express or other notice thereof, save as expressly provided by the laws of Delaware.

Appendix B

ARTICLE II.

Stockholders' Meetings.

Section 1. All meetings of the stockholders shall be held at the office of the corporation in the City of New York, State of New York.

Section 2. An annual meeting of stockholders shall be held on the first Wednesday of April in each year at eleven o'clock A. M., at which meeting there shall be elected by ballot a Board of Directors, not to exceed twenty-five in number. There may be seven Directors-At-Large, and the others shall be the persons nominated by districts as provided in Section 8 of this Article; provided, however, that if at any time any corporation or corporations engaged in whole or in part in the common carriage of passengers by bus (hereinafter called Bus Company Stockholders) are the holders of at least 20% of the stock issued and outstanding, the Bus Company Stockholders shall be entitled to nominate five of the Directors-At-Large in the manner provided in the next succeeding paragraph. The number, not to exceed eighteen, so nominated by districts shall be determined as provided in said Section 8. At such meeting there shall be transacted such other business as may properly be brought before the meeting.

Not more than thirty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the Corporation shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, send to each Bus Company Stockholder a form of vote for the number of and for nominations for five Directors-At-Large. Each Bus Company Stockholder receiving the same

shall thereupon name the persons proposed by such Bus Company Stockholder as nominees for five Directors-At-Large and return such vote to the Secretary with a statement of the number of shares voted by such Bus Company Stockholder in favor of each such nominee. Each Bus Company Stockholder shall be entitled to the same number of nominating votes for each of its said nominees for directors as the number of shares of stock which such Bus Company Stockholder will be entitled to vote at such annual meeting. The Secretary shall canvass the nominating votes of the Bus Company Stockholders received by him prior to such annual meeting and shall report the same to the stockholders at the meeting. The five nominees receiving the most nominating votes shall be the nominees for the five Directors-At-Large to be nominated by the Bus Company Stockholders.

SECTION 3. The holders of a majority of the stock issued and outstanding, present in person, or represented by proxy, shall be requisite and shall constitute a quorum at all meetings of the stockholders for the transaction of business except as otherwise provided by law, by the certificate of incorporation or by these by-laws. If, however, such majority shall not be present or represented at any meeting of the stockholders, the stockholders present in person, or by proxy, shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until the requisite amount of stock shall be present. At such adjourned meeting at which the requisite amount of stock shall be represented any business may be transacted which might have been transacted at the meeting as originally notified.

SECTION 4. At each meeting of the stockholders every stockholder shall be entitled to vote in person, or by proxy appointed by an instrument in writing subscribed by such stockholder and bearing a date not more than thirty days prior to said meeting, unless said instrument provides for a longer period. Each stockholder shall have one vote for each share of stock registered in its name on the books of the corporation, except that no share of stock shall be voted at any election for directors which has been transferred on the books of the corporation within twenty days next preceding such election. The vote for directors, and, upon demand of any stockholder, the vote upon any question before the meeting, shall be by ballot. All elections shall be had and all questions decided by a plurality vote.

SECTION 5. Written notice of the annual meeting of stockholders shall be mailed to each stockholder at such address as appears on the stock book of the corporation, at least ten days prior to the meeting. A complete list of the stockholders, arranged in alphabetical order, with the address of each, and the number of shares held by each, shall be prepared by the Secretary and filed in the office where the election is to be held, at least ten days before every election, and shall at all times, during the usual hours for business, and during the whole time of said election, be open to the examination of any stockholder.

SECTION 6. Special meetings of the stockholders, for any purpose or purposes, unless otherwise prescribed by statute, may be called by the President, and shall be called by the President or Secretary at the request in writing of a majority of the Board of Directors, or at the request in writing of stockholders owning a majority in amount of

the entire capital stock of the corporation issued and outstanding. Such request shall state the purpose or purposes of the proposed meeting. Business transacted at all special meetings shall be confined to the objects stated in the call. Written notice of a special meeting of stockholders, stating the time and place and object thereof shall be mailed, postage prepaid, at least ten days before such meeting, to each stockholder at such address as appears on the books of the corporation.

SECTION 7. The President shall act as chairman of all meetings of stockholders. In his absence a chairman shall be elected by the meeting.

SECTION 8. Of the total number of directors to be elected at the annual meeting of stockholders, a maximum of eighteen shall be nominated by districts as provided in this section. For the purposes of such nomination the continental United States shall be divided into three districts known as the Eastern District, the Southern District and the Western District.

The Eastern District shall be bounded by the Atlantic Seaboard from the Canadian boundary to Norfolk, Virginia, by the main line of the Norfolk and Western Railway from Norfolk, Virginia, to Kenova, West Virginia, by the main line of the Chesapeake & Ohio Railway from Kenova, West Virginia, to Cincinnati, Ohio, by the Ohio River from Cincinnati, Ohio, to Cairo, Illinois, by the Mississippi River from Cairo, Illinois, to the mouth of the Illinois River at or near Grafton, Illinois, by the Illinois River from Grafton, Illinois, to Pekin, Illinois, by a line south and east of the Atchison, Topeka and Santa Fe Rail-

way from Pekin, Illinois, through Joliet and Streator, Illinois, to Chicago, Illinois, by a line drawn from Chicago, Illinois, to include the Southern Peninsula of Michigan and thence following the Canadian boundary to the Atlantic Seaboard; including, however, the Norfolk and Western Railway, the Chesapeake & Ohio Railway, the Canadian National Railways and the Virginian Railway.

The Southern District shall be bounded by the Atlantic Seaboard on the east, by the Eastern District on the north, by the Mississippi River on the west, and by the Gulf of Mexico on the south.

The Western District shall be bounded by the Eastern District and the Southern District on the east, by the Gulf of Mexico and the Mexican boundary on the south, by the Pacific Ocean on the west, and by the Canadian boundary on the north.

Each railroad corporation which is the holder of stock of the corporation shall be deemed a member of the district in which its line of railroad is located, or, if located in more than one district, of the district in which the greater portion of the main-line mileage of its system is located, excluding, however, mileage of any controlled company which is itself a holder of stock of the corporation.

Not more than seven directors shall be nominated by the members of the Eastern District, not more than six directors by the members of the Western District, and not more than five directors by the members of the Southern District. Prior to thirty days before the date of the annual meeting of stockholders, the incumbent directors from each district shall cause the Secretary of the Corporation to be advised in writing of their determination made by majority vote of the number of directors, not to exceed the numbers set forth in

the preceding sentence, to be nominated by such district to serve during the ensuing year. Such number shall be effective for each district unless changed at the annual meeting of stockholders by majority vote of the stockholders of such district. In the event of failure of the directors of any district to advise the Secretary of a determination of the number of directors of such district, the number submitted by the Secretary to the stockholders shall be the number for such district at the time of submission.

Not more than thirty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the Corporation shall send to each holder of stock of the corporation a form of vote for the number of and for nominations for directors from the district of which such stockholder is a member, stating the number of directors, determined as set forth hereinabove, to be nominated by the members of such district. The stockholder receiving the same shall thereupon name the persons proposed by such stockholder as nominees for directors from the district of which such stockholder is a member and return such vote to the Secretary with a statement of the number of shares voted by such stockholder in favor of each such nominee. The number of persons proposed by each stockholder shall not exceed the number specified by the Secretary for the district of which such stockholder is a member, unless such stockholder is voting that a different number of directors be nominated by his district. Each stockholder shall be entitled to the same number of nominating votes for each of its said nominees for directors from the district as the number of shares of stock which such stockholder will be entitled to vote at such annual meeting.

The Secretary shall canvass the nominating votes of the members of each district received by him prior to such

annual meeting, and shall report the same to the stockholders at the meeting. The number of persons, equal to the number determined as set forth hereinabove for such district, receiving the most nominating votes in each district shall be the nominees of that district.

ARTICLE III.

Directors.

Section 1. The property and business of the corporation shall be managed by its Board of Directors. Directors need not be stockholders. They shall be elected at the annual meeting of the stockholders, and each director shall be elected to serve until his successor shall be elected and shall qualify.

Section 2. A vacancy in the Board of Directors resulting from the resignation or death of a director elected on the nomination of stockholders of a district shall be filled for the unexpired term by the election of a person nominated by the remaining directors for such district by majority vote; provided, however, that such remaining directors for such district may, by majority vote, elect not to fill such vacancy but to reduce the number of directors for such district. At any time when the number of directors nominated by the stockholders of any district is less than the maximum number for such district as specified in Section 8 of Article II of these by-laws, the directors for such district may, by majority vote, increase their number up to such maximum number, and the resulting vacancies shall be filled for the unexpired term by election of the person or persons nominated by such directors. Any

vacancy in the positions of Director at Large may be filled for the unexpired term by a vote of the majority of the remaining directors.

SECTION 3. The directors may hold their meetings and have one or more offices and keep the books of the corporation, except the original or duplicate stock ledger, outside of the State of Delaware, at the office of the corporation in the City of New York, State of New York, or at such other places as they may from time to time determine.

SECTION 4. In addition to the powers and authorities by these by-laws expressly conferred upon them, the Board may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these by-laws directed or required to be exercised or done by the stockholders.

SECTION 5. Directors, as such, shall not receive any stated salary for their services, but by resolution of the Board, a fixed sum and expenses of attendance, if any, may be allowed for attendance at each regular or special meeting of the Board; provided, that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor.

SECTION 6. Regular meetings of the Board may be held without notice at such time and place as shall from time to time be determined by the Board.

SECTION 7. Special meetings of the Board may be called by the President on not less than three days' notice

to each director, either personally or by mail or by telegram; special meetings shall be called by the President or Secretary in like manner and on like notice on the written request of three directors.

SECTION 8. Except as may be otherwise specifically provided by statute or by the certificate of incorporation or by these by-laws, at all meetings of the Board a majority of the directors who are qualified to act shall be necessary and sufficient to constitute a quorum for the transaction of business, and the act of a majority of such directors present at any meeting at which there is a quorum shall be the act of the Board of Directors, provided, however, that for the purpose of accepting resignations of directors and filling any vacancy or vacancies (including newly created directorships) in the Board the directors present qualified to act shall constitute a quorum.

ARTICLE IV.

EXECUTIVE COMMITTEE.

There may be an Executive Committee elected by the Board of Directors from its members, of such number as the Board shall determine, whose terms of office shall continue during the pleasure of the Board. Said Committee may meet at stated times, or on notice given by the Secretary. During the intervals between meetings of the Board such Committee shall advise with and aid the officers of the corporation in all matters concerning its interests and the management of its business, and generally perform such duties and exercise such powers as may be directed or dele-

gated by the Board of Directors from time to time. The Board may delegate to such Committee authority to exercise all the powers of the Board (excepting power to amend the by-laws), while the Board is not in session. Vacancies in the membership of the Committee shall be filled by the Board of Directors. The Executive Committee shall keep regular minutes of its proceedings and report the same to the Board at its next succeeding meeting.

ARTICLE V.

OFFICERS.

SECTION 1. The Board of Directors at its first meeting after election by the stockholders shall organize by the election from their own number of a President and by the appointment of a Secretary, an Assistant Secretary, a Treasurer and Assistant Treasurers, who need not be members of the Board. The Board of Directors may also from time to time appoint such additional assistant secretaries and such additional assistant treasurers, to perform specific duties, as it may deem necessary.

SECTION 2. The Board of Directors may also appoint such Vice-Presidents and other officers, agents and factors as the Board may from time to time deem necessary, who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board or as shall be assigned to them by the President.

SECTION 3. The Board of Directors may designate any Vice-President to act as President in case of the absence or disability of the President.

SECTION 4. The Board of Directors shall have power at any time to remove any officer and this by-law shall form a part of the contract with every officer.

ARTICLE VI.

PRESIDENT.

SECTION 1. The President shall be the chief executive officer of the corporation and, in the absence of an elected chairman, shall preside at all meetings of the Board of Directors. He shall have, subject to the Board of Directors, general supervision, control and management of the property and business of the corporation, and of all its departments, officers, employees and agents.

SECTION 2. Unless otherwise ordered by the Board of Directors, the President shall have full power and authority in behalf of Railway Express Agency, Incorporated, in person or by written proxy, executed by him in the name of the corporation and under its corporate seal, attested by the Secretary, to attend and to act and to vote at any meeting of stockholders of any corporation in which the Railway Express Agency, Incorporated, may hold stock; and, at any such meeting, he shall possess and in person or by such proxy may exercise any and all rights and powers incident to the ownership of such stock, and which as the owner thereof it might have possessed or exercised if present. The Board of Directors by resolution, from time to time, may confer like powers upon any other person or persons.

Appendix B

ARTICLE VII.

SECRETARY.

SECTION 1. The Secretary shall attend all meetings of the Stockholders and of the Board of Directors and of the Executive Committee. He shall keep an accurate record of the proceedings at such meetings and shall notify the several officers of the corporation of action taken concerning matters in their respective departments. He shall be custodian of the seal of the corporation. He shall give or cause to be given notice of all meetings of the stockholders and of the Board of Directors and Executive Committee and shall perform such other duties as may from time to time be prescribed by the Board of Directors or by the President.

SECTION 2. The Secretary and/or any Assistant Secretary shall keep and have the custody of the stockbooks of the corporation, and shall transfer all stock, bonds and other securities of the corporation.

SECTION 3. In the absence or disability of the Secretary, the Assistant Secretary shall perform the duties of the Secretary and shall perform such other duties as may be assigned to him by the Secretary or by the President.

ARTICLE VIII.

TREASURER.

SECTION 1. The Treasurer shall have the custody of the funds and securities of the corporation. He shall deposit funds received by him for account of the corpora-

tion, and require agents and others who collect and receive operating revenues and other funds for account of the corporation to deposit the same, in such banks or other depositaries as the Board of Directors or the President may designate from time to time. He shall show the disposition of all moneys that may pass through his hands, in books belonging to the corporation kept for that purpose. He shall disburse the funds of the corporation under the authority of the Board of Directors or the President, or may authorize others to do so, under such regulations as may be approved by the Board of Directors or the President, taking proper vouchers for such disbursements. He shall make such reports to the Board of Directors and to the President of the transactions of his office as shall be called for, and shall perform such other duties connected with the finances of the corporation as may from time to time be assigned to him by the Board of Directors or the President.

SECTION 2. All securities in the custody of the Treasurer shall be held in safe deposit vaults designated by the Board of Directors or the President subject to such regulations in respect to access thereto or deposit or withdrawal thereof, as may from time to time be ordered by the Board of Directors or the President.

SECTION 3. He shall give a bond with one or more sureties, conditioned upon the faithful discharge of his duties, which bond and the amount thereof shall be approved by the Board of Directors or by the President.

SECTION 4. The Assistant Treasurers shall perform such duties as may be required of them by the Treasurer

or by the President, and shall each give a bond, with one or more sureties, conditioned upon the faithful discharge of his duties, which bonds and the amounts thereof shall be approved by the Board of Directors or the President.

ARTICLE IX.

Each member of the Board of Directors and each officer of the corporation, and former directors and officers, their heirs, executors and administrators, and any person who may have served at this corporation's request as a director or officer of another corporation in which this corporation owns shares of capital stock, shall be indemnified by this corporation against expenses actually and necessarily incurred by them in connection with the defense of any action, suit or proceeding in which such director or officer is made a party by reason of his being or having been a director or officer as aforesaid, except in relation to matters as to which he shall be finally adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of his duties as such director or officer. As used in this article, expenses shall include amounts of judgments against, or amounts paid in settlement by, such director or officer, other than amounts payable or paid to the corporation. The foregoing indemnification shall not be deemed exclusive of any other rights to which such director or officer may be entitled, under any by-law, agreement, vote of stockholders, or otherwise.

Appendix B

ARTICLE X.

TARIFFS.

The General Traffic Manager, Assistant General Traffic Manager or Traffic Manager of the corporation shall be authorized by this by-law to prepare and issue tariffs of the tolls to be charged for all traffic carried by the corporation, and to submit the same and to file the same with the Board of Transport Commissioners for Canada, as required by the Railway Act of Canada.

ARTICLE XI.

AMENDMENTS.

These by-laws may be altered or amended by the affirmative vote of a majority of the stock issued and outstanding and entitled to vote at any regular or special meeting of stockholders, if notice of the proposed alteration or amendment be contained in the notice of the meeting, or by the affirmative vote of a majority of the Board of Directors at a regular or special meeting of the Board; provided, however, that no alteration or amendment be made in the number of directors of this corporation or in the method of nominating the directors of this corporation except by the affirmative vote of two-thirds of the stock issued and outstanding and entitled to vote; and provided, further that no change of the time or place for the election of directors shall be made within sixty days next before the day on which such election is to be held, and that in case of any change of such time or place, notice thereof shall be given to each stockholder in person or by letter mailed to its last

known post-office address at least twenty days before the election is held; and provided, further that if any such alteration or amendment be made in the number of Directors of this Corporation or in the method of nominating Directors-At-Large of this Corporation, said affirmative vote of two-thirds of the stock issued and outstanding and entitled to a vote shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, include a majority of the issued and outstanding stock held by the Bus Company Stockholders.

ARTICLE XII.

SEAL.

The corporate seal is, and, until otherwise ordered by the Board of Directors, shall be, an impression, circular in form, with the words "Railway Express Agency, Incorporated" on the outer edge thereof, and the words and figures "Corporate Seal", "1928", "Delaware" in the center thereof.

APPENDIX C

THE GREYHOUND CORPORATION
140 South Dearborn Street
Chicago 3, Illinois

OFFICE OF THE GENERAL COUNSEL
601 California Street
San Francisco, California

December 3, 1964

AIR MAIL

Mr. Richard Block, Jr.
Assistant Director
Bureau of Finance
Interstate Commerce Commission
Washington, D. C. 20423

Docket No. 23324

Dear Mr. Block:

This is in response to your letter of November 24, 1964, in which it is suggested that The Greyhound Corporation ("Greyhound") file an application under Section 5(2) of the Interstate Commerce Act to acquire control of Railway Express Agency, Incorporated ("R E A"), which application you say may be accompanied by a motion to dismiss. At the time when Greyhound agreed to acquire a 20% interest in R E A, careful consideration was given to the necessity or even the desirability of following the precise procedure which you suggest. However, it appeared so clear to us at the time that there was no possibility of actual control through the acquisition of a 20% interest that it was determined that no Section 5 application should be filed. That is still our view.

Appendix C

The Commission has before it, through submissions of R E A in Finance Docket No. 23324, all of the relevant facts. These facts show that Greyhound attempted to acquire stock control of R E A, later agreed to accept equal stock ownership with the railroads, and finally agreed to purchase the 20% stock interest as set forth in Finance Docket No. 23324. Our view that the transaction pending before the Commission in that docket would not result in control by Greyhound was based principally upon the following circumstances:

(1) Greyhound would have only a 20% stock interest in R E A.

(2) Greyhound would not be in a position to acquire any further stock interest in R E A since all of the outstanding R E A stock is subject to a right of first refusal of the existing railroad shareholders. We were told in negotiations by representatives of the railroads, including representatives of the Southern Pacific Company that Greyhound would not acquire one additional share of the presently outstanding stock.

(3) The make-up of the Board of Directors of R E A under the bylaws, as amended, would not permit Greyhound to control the Board of Directors.

(4) The negotiations with the railroads for acquisition of an interest in R E A demonstrated to us that the railroads act in groups, each of which controls more stock than Greyhound would have.

These circumstances indicated to Greyhound that there would be no possibility of exercising control over R E A. Accordingly, Greyhound does not desire to be authorized to acquire control of R E A, since it would not want to assume the responsibility which might be attributed to such ostensible control when it would have no power of actual control.

Greyhound feels, therefore, that it must respectfully decline to file a Section 5 application, and it reiterates what it said in its petition for leave to intervene in Finance Docket No. 23324, namely, that if in the future it should appear that there is any possibility of such control by Greyhound, Greyhound will file the necessary Section 5 application.

Very sincerely yours,

/s/ GERALD H. TRAUTMAN
Gerald H. Trautman

APPENDIX D

Neither the Commission nor the district court decided anything with respect to the control or competition issues except that consideration of them "would not be appropriate at this time" (R. 200, 416). We have thus assumed *arguendo* in the body of our brief that a serious question with respect to competitive effect was presented and, we contend, properly deferred. Nevertheless, since appellants' definition of the relevant market colors their entire argument and since it has the virtue of superficial simplicity and conveys the erroneous impression that, although no party suggested appellants' present definition in the proceedings below, it must have been obvious to the Commission, we are impelled to comment briefly on that aspect of their argument.

APPELLANTS' NOVEL DEFINITION OF THE RELEVANT MARKET IS INCONSISTENT WITH COMMISSION FINDINGS IN THE SAME AREA AND CANNOT BE RECONCILED WITH APPELLANTS' OWN PLEADINGS.

Appellants now allege that the transportation of express constitutes an identifiable "line of commerce". They place their entire reliance for the identity of that line of commerce upon the Commission's decision in *Transportation Activities of Arrowhead Freight Lines,* 61 M. C. C. 131, 135 (1952), and a group of cases decided between 1908 and 1932 (Brief for Appellants, p. 32). That reliance is completely misplaced because the decision in *Arrowhead* was reversed in *Arrowhead Freight Lines* v. *United States,* 114 F. Supp. 804 (S. D. Cal. 1953), where the court, after referring to the portion of the Commission's report relied upon by appellants, held

> "All of which seems to tell us that the so-called 'express carrier' finds it impossible to provide better

equipment, and unlawful to provide faster service than motor carriers of 'ordinary freight'; while motor carriers of 'ordinary freight' are permitted to call themselves 'express' carriers and to hold themselves out as providing 'express service at freight rates'.

"By a process of exclusion then, we infer that the only criterion by which the Commission, or the carriers themselves, or any one else, can distinguish 'ordinary freight' motor carriers from an 'express' motor carrier is that the latter is expected to charge a higher rate for the same service." (114 F. Supp. at 813.)

On remand, the Commission laid down five general criteria for defining "express service", *Transportation Activities of Arrowhead Freight Lines,* 63 M. C. C. 573, 581-82 (1955).[21]

[21]"Succinctly stated the rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and, (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay." 63 M. C. C. at 581-82.

More recently, the Commission, citing those five criteria, held,

> "It is true that transportation conditions have changed over the years so as to permit ordinary freight carriers to improve their operation to the point where they are now in a position to provide service substantially equivalent to that of express. Thus, the distinction between the two types of service has been blurred to some extent." *Freight, All Kinds, L. C. L. Container Charges—U. S. A.*, 323 I. C. C. 468, 483 (1964), *sustained sub nom. New Eng. Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass.), *aff'd per curiam*, 87 Sup. Ct. 407 (1966).

It is abundantly clear that, whatever may have been the situation prior to 1932, it is no longer possible to draw a clear line of demarcation between "express" and "ordinary freight".[22] Moreover,

> "REA holds itself out to transport all commodities, in any form tendered, covered by its tariff publications, and it has been called upon over the

[22]For example, consider some of the transportation alternatives open to a New York garment manufacturer (some of whom are excellent customers of REA). He can ship his dresses via REA, *i.e.*, as "express"; he can ship them in small lots via parcel post; he can send his dresses in various sized lots to a freight forwarder; he can ship them via certificated motor carrier (with or without pickup at his place of business); he can ship them by air freight; or he can make arrangements with a non-certificated trucker, a "contract" carrier, for delivery. Depending on circumstances, these methods can be very similar in cost and in speed of delivery; yet his parcels of clothing are "express" only if REA carries them. *Cf.*, Petition of Freight Forwarders, R. 46: "We are concerned with what a person does more than with mere nomenclature."

> years to handle merchandise of every description, including items such as foodstuffs, seafood, fresh meats, drugs and medicines, film, legal papers, jewelry and other valuables, live animals, baby chicks, radioactive material, corpses, live blood, eggs, explosives, commodities which are injurious or contaminating to other lading, and commodities requiring special care and protection." *Railway Exp. Agency, Inc., Extension—Nashau, N. H.*, 91 M. C. C. 311, 315 (1962), *sustained sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 28 (D. Mass. 1963), *aff'd per curiam*, 376 U. S. 514 (1964).

It is rather difficult for us to visualize Greyhound transporting fresh meats, live animals, baby chicks, radioactive material, corpses, explosives, etc., in the bins under the passenger compartment of its buses. But, according to appellants, REA and Greyhound together control 95% of the "express" market "and all other motor carriers of passengers combined . . . had most of the balance", Appellants' Brief, p. 34. If appellants' construction of the market is correct, why have five railroads, seventeen motor carriers, the national association of freight forwarders, the national association of motor carriers and one of its conferences opposed the present transaction with such vigor?

The answer is to be found in the pleadings below. At that stage, appellants were less sophisticated but more candid with respect to the market in which REA competes. For instance, in the complaint of appellant Freight Forwarders, it is alleged that

> "Intervening plaintiff's members are in direct competition with Railway Express Agency (REA)

and with Greyhound Corporation in the movement of package freight between points in the Continental United States" (R. 329).

Freight Forwarders told the Commission that REA

> "is departing more and more from its traditional role in the general scheme of transportation and is entering the domain of a hauler of general freight in volume lots as distinguished from 'express matter' . . ." (R. 46).

Similarly in the complaint of appellant truck lines, it is contended that

> "Each of said plaintiffs competes over one or more of its authorized routes with Railway Express Agency, . . . and with Greyhound Corporation . . . or corporations controlled by it, in the transportation of property for hire." (R. 332).

The same appellants told the Commission that if REA obtains the needed financing it will be able to "expand the area and intensity of its competition with motor common carriers" (R. 172). Finally, appellants ATA and the Conference also declared in their Petition for Leave to Intervene that their members were in competition with both REA and Greyhound:

> "The Executive Committee of ATA and the Board of Governors of the Conference, composed of motor carriers competitive with Railway Express Agency, Inc. (REA), and the freight operations of The Greyhound Corporation (Greyhound), have reviewed the matter and respectively directed

ATA and the Conference to file this petition and protest" (R. 79).

Thus, from appellants' own pleadings it appears far more likely that REA was correct when it stated before the Commission that it competes with Greyhound only for the business of shipping small packages of such size, weight, volume and character that can be transported on passenger vehicles. Of this business, Greyhound handles substantially less than one percent and REA handles about two percent of the United States total, the remaining ninety-seven-plus being handled by freight forwarders, trucks, railroads and the United States Post Office (R. 186, 191).

It is quite clear that REA does in fact compete with carriers of ordinary freight, freight forwarders and the United States Post Office. Perhaps the broadest competition for REA comes from the freight forwarders, who

> "... aggregate numerous small shipments of individual consignors into consolidated consignments moving in carloads or truckloads. The forwarder holds itself out to the public to provide a through transportation service from point of receipt of the shipment to final destination in its own name and under its responsibility", *Freight Forwarders, Motor Common Carriers, Agreements,* 272 I. C. C. 413, 418 (1948); see also *Motor Rail Co., Determination of Status,* 296 I. C. C. 205, 211-15 (1955).

The functions performed by the freight forwarders are quite similar to those performed by REA:

> "Rail operations of the freight forwarders resemble in many respects the operations of the rail-

> way express companies. The shipments handled by each are composed principally of less-than-carload lots. Each provides a collection and delivery service at many points, and each reserves the right to route shipments." *Freight Forwarding Investigation,* 229 I. C. C. 201, 211 (1938).

In fact, "the mode of transportation employed by forwarders is analogous to that of express companies", *Acme Fast Freight* v. *United States,* 30 F. Supp. 968, 973 (S. D. N. Y.); *aff'd per curiam,* 309 U. S. 638 (1940). As the Commission found as early as 1938, "much traffic has been diverted from the Railway Express Agency, Incorporated, to freight forwarders since the rail carriers expedited their freight-train service", *Freight Forwarding Investigation,* 229 I. C. C. 201, 211 (1938).

The competition faced by REA from the United States Post Office will be intensified as the provisions of P. L. 89-593, 80 Stat. 815 (1966), which gradually increases the maximum size and weight of packages transported by Parcel Post, comes into effect:

> "While estimates vary as to the probable quantity involved, there is no question that the higher maximum limits on parcel post size and weight between first-class post offices will result in substantial diversion of package traffic from private carriers to parcel post. *A large amount of this traffic will be diverted from REA Express.*" Sen. Rep. No. 1534, 89th Cong., 2d Sess., 6-7 (1966) (emphasis added).

Motor carriers are increasing their very large participation in the transportation of small shipments:

Appendix D

"Movement of small-shipment traffic by regulated carriers in 1964 followed trends similar to those noted [for 1963.] . . . Transportation of small shipments by motor carriers increased. . . .

"Revenues for less-than-truckload shipments (those weighing up to 10,000 pounds) by class I motor carriers of general freight amounted to $2.7 billion in 1964 an increase of 8.3 percent over 1963. The number of tons aggregated 69.4 million and the number of shipments carried totaled 247.1 million, an increase of 5.7 and 3.9 percent, respectively, over the previous year. Average weight per shipment rose from 552 to 561 pounds." 79 ICC ANN. REP. 20 (1965).

Since the distinction between express service and regular carriage is "blurred", *Freight, All Kinds, L. C. L. Container Charges—U. S. A.*, 323 I. C. C. 468, 483 (1964), *sustained sub nom., New Eng. Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass.), *aff'd per curiam*, 87 Sup. Ct. 407 (1966), there is a large area within which REA and motor carriers are in direct competition. See, *e.g., Men's & Boys' Outerwear—Bruceton, Tenn. to U. S. A.*, 325 I. C. C. 284, 296-97 (1965); *Railway Exp. Agency, Inc., Determination of Status*, 21 M. C. C. 161, 192 (1939).

Enough has been said to demonstrate the speciousness and artificiality of appellants' market definition.[23]

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[23]Technically, if appellants' present definition of the market were correct, the truck lines, freight forwarders, and trucking associations would lack standing to participate in this proceeding since they could not qualify as "persons interested in or affected by the rate, regulation, or practice under consideration" (49 U. S. C. § 42).

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 405–416) is reported at 255 F. Supp. 704. The findings and order of Division 3 of the Interstate Commerce Commission (R. 197–202) and the order of the full Commission (R. 304–305) are not reported.

JURISDICTION

The order of the district court dismissing the complaints was entered on April 11, 1966 (R. 417), and the notice of appeal was filed on May 3, 1966 (R. 418–

429). This Court noted probable jurisdiction on October 17, 1966 (R. 432; 385 U.S. 897). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

Railway Express Agency, Inc. ("REA") applied to the Interstate Commerce Commission for authorization, under Section 20a of the Interstate Commerce Act, to issue 500,000 shares (or 20%) of its capital stock for sale to the Greyhound Corporation at $20 per share. REA's application disclosed that Greyhound has undertaken, upon acquisition of those shares, to offer for 60 days to purchase up to 1 million shares of REA's outstanding stock, all of which is owned by 60 railroads. Each railroad has a right of first refusal as to the outstanding shares, and some of the railroads have indicated an intent to exercise that right. Finding the issuance of the 500,000 shares for sale to Greyhound to be both provident and urgently needed, the Commission authorized the issuance under Section 20a but declined to decide, pending the outcome of Greyhound's 60-day offer, any questions of control or anticompetitive effect under Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act. The questions presented are:

1. Whether the Commission has power to approve a financial transaction under Section 20a while postponing consideration of possible control and competition issues until the relevant facts become known.

2. Whether the Commission abused its discretion in the circumstances of this case.

STATUTES INVOLVED

The pertinent portions of Sections 5, 20a, and 214 of the Interstate Commerce Act, 49 U.S.C. 5, 20a, 314, are set forth in the appendix to this brief (*infra,* pp. 35–44).

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (R. 417) dismissing appellants' suit to set aside an order (R. 197–202, 289–290, 304–305) of the Interstate Commerce Commission. The order granted the application of the Railway Express Agency, Inc. ("REA"), under Sections 20a and 214 of the Interstate Commerce Act, to issue 500,000 shares (or 20%) of its common stock for sale to the Greyhound Corporation.

THE STATUTORY SCHEME

Section 20a of the Interstate Commerce Act (49 U.S.C. 20a) provides that before a carrier may issue stock or other securities it must obtain the approval of the Interstate Commerce Commission. The Commission may authorize such issuance if it finds that it "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose" (Section 20a(2)). The Commission may hold hearings "if it sees fit" (Section 20a(6)). Section 214 of the Act makes Section 20a applicable to motor carriers.

Section 5(2) of the Act authorizes the Commission to approve acquisitions of the control of a carrier if it finds that the acquisition is consistent with the public interest. The Commission may conduct hearings if "it shall consider it necessary" (Section 5(2)(b)). Any acquisition approved under Section 5(2) is exempted from the antitrust laws by Section 5(11). Under Section 5(4) it is unlawful for any carrier to acquire control of a carrier without Commission approval. Upon complaint or upon its own initiative, the Commission may, under Section 5(7), determine whether any person has acquired unlawful control and require it to take such action as is necessary to prevent continuance of the violation.

The Commission also has jurisdiction under Section 11 of the Clayton Act (15 U.S.C. 21) to enforce Section 7 of that Act (15 U.S.C. 18) against acquisitions of the stock or assets of carriers subject to its jurisdiction where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

BACKGROUND

REA is a common carrier by express on railroads and a common carrier by motor vehicle, subject to the jurisdiction of the Interstate Commerce Commission (R. 1).[1]

Greyhound, through its wholly owned subsidiary, Greyhound Lines, Inc., operates a nationwide passenger bus system and, like other bus companies, also

[1] REA also operates as an indirect air carrier subject to regulation by the Civil Aeronautics Board (49 U.S.C. 1301(3)) and provides ocean service under regulation by the Federal Maritime Commission (46 U.S.C. 801).

carries some small-package express shipments on its passenger buses (R. 353).

REA is presently owned and controlled entirely by railroads. Its charter authorizes 2,576,000 shares of common stock, of which 1,999,188 shares have been issued. At the time of the proceedings before the Commission, sixty railroad stockholders owned the outstanding stock (including the five railroad appellants herein,[2] which together own slightly more than 10%) (R. 40–41). Sale of all outstanding stock is subject to a right of first refusal by the railroad shareholders (R. 83). On the other hand, 500,000 unissued shares are not subject to that right. The railroad stockholders also hold approximately $27 million in REA notes. In 1962, the Commission authorized REA under Section 20a to have non-railroad stockholders (R. 6). *Railway Express Agency, Inc., Stock* I.C.C. Finance Docket No. 22349, December 21, 1962. This case involves the first application to the Commission to implement that authority.

Under its by-laws, REA is governed by a board of directors with 25 members. Seven members are elected at large,[3] and 18 members are nominated by the railroad stockholders, grouped into three regional districts. The Eastern District (with 1,085,748

[2] The Denver and Rio Grande Western R. Co., The Atchison, Topeka and Santa Fe Ry. Co., St. Louis Southwestern Ry. Co., St. Louis Southwestern Railway Company of Texas, and Southern Pacific Company.

[3] There are now two vacancies among the at-large directors. When and if the sale of 500,000 shares to Greyhound is consummated, Greyhound will be entitled to name 5 of the 7 (R. 15).

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shares) nominates 7 directors; the Western District (with 633,180 shares) nominates 6; and the Southern District (with 280,260 shares) nominates 5 (R. 36). The right of each district to nominate a specified number of directors does not depend upon the number of shares its members hold and can be changed only by a vote of two-thirds of the outstanding stock (R. 90).

From 1929 to 1961 REA was operated on a non-profit basis as a service organization for railroads participating in a pooling agreement approved by the Commission. *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I.C.C. 423. Its profits or losses were shared by the railroad stockholders. In 1961 it changed to a profit-and-loss basis and began to acquire facilities and equipment, which had previously been leased or otherwise obtained from the railroads (R. 34).

Its program of capital expenditures to acquire and modernize the terminals and equipment needed for a viable, independent existence severely drained its resources. From 1960 through August 1964, it made capital expenditures of almost seventeen million dollars, borrowing over $8.5 million for this purpose. At the time of the Commission proceedings, $8,468,000 of this debt remained unpaid. Moreover, continuation and completion of its terminal and equipment program was estimated to require additional capital expenditures of almost forty million dollars (including $27 million for terminals and $10 million for automotive equipment) (R. 5–6, 11–14, 34). To raise this large sum would require substantial debt financing. In view of REA's short history of profitable opera-

tions, and its unfavorable ratio of debt to equity, such new borrowing was expected to be quite difficult (R. 200).[4]

REA'S NEGOTIATIONS WITH GREYHOUND

In January 1964, Greyhound submitted to REA a tentative proposal to purchase, subject to Commission approval, at least 51 percent of REA's outstanding stock, and an additional 16 percent for resale to airlines (R. 82–83, 93–97). As part of that proposal, Greyhound offered to finance its pro rata share of REA's capital requirements. During the course of negotiations on Greyhound's offer, operating personnel of Greyhound and REA prepared a joint, preliminary estimate of economies which might be realized through consolidation of various facilities of the two companies (R. 88–89). Their report (R. 149–156) did not purport to commit either company to any course of action. Greyhound's offer was, however, contingent upon the waiver by all present stockholders (including appellant railroads) of their right of first refusal, and was not accepted.

In July 1964, Greyhound submitted a second offer to REA (R. 109–112). Greyhound asserted its interest in achieving the economies and improved service which might be realized through the "combination and correlation" of some operations of the two companies, but stated "that in order to give Greyhound an incentive to pursue these possibilities it should have at least a 20% equity interest in REA" (R. 109–110). To that end Greyhound offered to purchase 500,000

[4] For a history of REA's difficulties, see *Study of REA Express*, issued by Staff Liaison Group V–C, Civil Aeronautics Board, Federal Maritime Commission and Interstate Commerce Commission (August, 1965).

shares of authorized but unissued stock at $16 a share, on the following conditions: (1) Greyhound would be permitted to name 20% of the board of directors. (2) REA would undertake to secure from its noteholders waiver or cancellation of a prohibition against payment of dividends. (3) REA's board would declare the intention "to consider seriously and work toward a long-term agreement" for coordination of operations. (4) REA's board would declare the intention "to seriously consider at a later time" sale of REA stock to airlines or the general public. Greyhound further offered to purchase, for not more than $25 per share, such additional shares as the present stockholders might tender up to 749,594 shares (which, together with the initial 500,000 shares, would give Greyhound a 50% interest), thereby creating a market for those stockholders that wished to sellout. It recognized that some railroad stockholders were opposed to its acquisition of the additional shares, which are subject to the right of first refusal, but was "willing at this time to proceed upon the basis of the foregoing offer, leaving to the future the question of the acquisition of additional shares by Greyhound and giving the railroads an opportunity to reconcile their views on this question" (R. 111).

At a meeting of REA's board on July 28, 1964, to consider this proposal, railroads opposed to Greyhound asserted their intention to exercise their right of first refusal in order to prevent Greyhound from acquiring any shares in addition to the 500,000 to be issued. They protested that it was unfair to require them to pay $25 per share in exercise of this right

when Greyhound was acquiring shares at $16. To accommodate them, the Board unanimously voted to negotiate a uniform price for both outstanding and unissued shares of $20 per share. At the same meeting the Eastern railroads represented that at least 900,000 shares would be offered for sale to those railroad stockholders that chose to exercise their right of first refusal (R. 83–84, 113). Greyhound subsequently agreed to offer a uniform price of $20 per share and undertook to buy up to one million shares of outstanding stock at that price.

On September 1, 1964, the REA board approved the Greyhound proposal by a vote of 14 to 3[*] and adopted resolutions complying with the conditions thereto. It also recommended to the stockholders that they authorize the issuance of the 500,000 shares of stock and that the by-laws be amended so as to permit Greyhound, upon acquisition of those shares, to nominate 5 of the at-large directors (R. 114–125). On October 1, 1964 the railroad stockholders approved the proposals by a vote of 1,654,572 to 269,880 shares. The opposing votes were cast by seven western railroads, including the five railroad appellants (R. 86).

On October 6, 1964, Greyhound accepted REA's tender of the 500,000 shares of unissued stock at $20 per share and became obligated to offer, for a period of 60 days after consummation of the initial stock sale, to purchase an additional one million shares of

[*] The opposing directors were affiliated with the Atchison, T. & S.F. and Southern Pacific railroads, who are appellants here, and the Missouri Pacific railroad (R. 130–131).

REA's outstanding stock, subject to the railroads' right of first refusal (R. 15–18).

PROCEEDINGS BEFORE THE COMMISSION

Pursuant to Section 20a, REA applied to the Commission on October 7, 1964, for approval of its issuance of 500,000 shares for sale to Greyhound (R. 1–32). The application and two supplementary statements required by the Commission (R. 33–41, 82–158) set forth detailed factual data concerning the proposed transaction, including the history of prior negotiations, REA's financial needs, and the uses to which the $10 million realized by the sale would be put. Those data have not been disputed.

Six groups of private intervenors opposed the application, urging in general that the Commission should conduct a hearing under Section 20a or determine under Section 5 whether Greyhound was acquiring control of REA. There was wide variation in the interests and positions of the intervenors:

(1) Six western railroad-stockholders, which had voted against the transaction, urged that it did not meet the requirements of Section 20a; one such railroad, Southern Pacific Company, filed a complaint under Section 5(7) charging Greyhound with unlawfully attempting to obtain control of REA without Commission approval, in violation of Section 5(4) (R. 48–50, 50–52, 63–65, 68–70, 71–73).

(2) The Transcontinental Bus System and 16 other bus companies which compete with Greyhound for bus traffic, and with Greyhound and REA for express business, filed what they characterized as "a petition

to broaden the issues" beyond the "limited and narrow" scope of Section 20a (R. 66). In particular, they requested the Commission to require REA and Greyhound to file an application under Section 5, since "[u]nlike Sections 20a and 214, Section 5 does allow, and in fact makes specific provision for, the presentation of the issues necessary for a determination of the question as to whether or not Greyhound should be allowed to consolidate its facilities and operations with those of R.E.A." (R. 67).

(3) The National Trailways Bus System, whose members also compete for bus and express business, claimed that acquisition by Greyhound of REA's operating rights and properties would result in destructive competition and would create a monoply (R. 60–62).

(4) The American Trucking Associations and its Regular Common Carrier Conference, whose members compete for freight with REA's express service, urged that, whether or not Greyhound acquired an additional 1 million shares, it might obtain control of REA and that REA's application constituted "an attempt to effect control of REA by Greyhound without going through a Section 5 proceeding" (R. 79–82).

(5) The Freight Forwarders Institute urged that REA's application be treated as "a mere launching pad for the lodgment in Greyhound of control of REA" which might lead to REA's conversion into a freight forwarder with "catastrophic" results for the Institute's members (R. 42–47).

(6) Denver Chicago Trucking Co., Inc., and other

independent truckers argued that the transaction was the first step in a plan of acquisition by Greyhound which, because of REA's recently acquired authority to offer container service,[6] would injure them by bolstering REA's competitive potential (R. 172–179).

The United States also intervened (R. 75–78). It urged the Commission "to institute a proceeding for the purpose of determining whether Section 7 of the Clayton Act would be violated by Greyhound's acquisition of REA stock under the circumstances and conditions outlined in REA's application" (R. 76). While taking no position as to whether a question of control under Section 5 was presented, the Department of Justice pointed out that a Section 5 proceeding might well be consolidated with a Section 7 proceeding "[s]ince the anticompetitive issues raised by a Clayton Act Section 7 proceeding are virtually identical to the competition issues which the Commission must consider in a Section 5 control proceeding" (R. 77–78).

The Greyhound Corporation intervened in support of the application (R. 73–75). It asserted that "because of the right of first refusal of [the] railroad stockholders * * * it is unlikely that Greyhound will acquire any more than [a] 20% interest in the future. In the event that Greyhound should subsequently acquire any additional stock interest which would even approach a position of control, Greyhound would

[6] *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, 323 I.C.C. 468, sustained, *New England Motore Rate Bureau Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass.), affirmed *per curiam* No. 591, this Term (December 5, 1966).

file an appropriate application under Section 5" (R. 74).

In reply to the various petitions, REA denied that any issue of control was presented by the transaction, citing the structure and composition of its board and the concentration of its stock in the hands of the railroads (R. 167–169). It also urged that the issues of control and of anticompetitive consequences were premature in the circumstances and that should they arise "all petitioners will have ample opportunity to participate in an appropriate proceeding under Section 5" (R. 164).

On March 15, 1965, Division 3 of the Commission approved the issuance of the 500,000 shares under Section 20a (R. 197–202). With respect to the intervenors' petitions, the Commission found that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time; and that a hearing is not necessary for a determination of the application for authority to issue [the] stock under the provisions of sections 20a and 214" (R. 198).

With respect to REA's application, the Commission found that REA urgently needs the $10,000,000 to be realized through the stock issue, that it is handicapped in borrowing capital funds because of its unfavorable debt-equity ratio, that the stock issue would improve the ratio while reducing the need for future borrowing, and that the sale price is fair and reasonable (R.

200). Cautioning that nothing in its order "shall be construed as a determination of any matter under any section of the act, except sections 20a and 214 * * * or as creating a presumption as to any action which may be taken on any * * * application under section 5" (R. 201), the Commission concluded that the stock issue

> * * * (a) is for a lawful object within [REA's] corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company * * * and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose * * *. (R. 201.)

Petitions for reconsideration were denied by Division 3 acting as an Appellate Division on May 28, 1965 (R. 289–290). Upon reconsideration by the full Commission, the action taken by Division 3 in its order of March 15, 1965, was affirmed on August 11, 1965 (R. 304–305).

JUDICIAL PROCEEDINGS

This action to enjoin and set aside the Commission's order was commenced on June 16, 1965, in the United States District Court for the District of Colorado (R. 308). The Commission postponed the effective date of its order pending the completion of these proceedings (R. 306–307). The United States filed an answer in the district court declining either to support or oppose the order of the Commission (R. 375).

On April 11, 1966, a unanimous three-judge district

court sustained the Commission's order (R. 405–416). The district court held that no "categorical answer" could be given to the question "whether, when a control question is raised, it must be decided in advance of a Section 20a approval of the issuance of stock" (R. 414). Recognizing that in some instances "consideration of the public interest may require such determination", the court held that in the present case the Commission had acted reasonably in determining that "the public interest requires the issuance of the stock" while deferring questions of control and anti-competitive effect until "after the chain of events started by the stock issuance is ascertainable rather than conjectural" (R. 414, 415). Noting the uncertainties created by the 60-day offer, the railroads' right of first refusal, the peculiar structure of REA's board of directors, and the highly tentative state of plans for coordination of REA and Greyhound facilities (R. 412–413) the court concluded that "[u]ntil the facts are developed by occurrences after the stock issuance, hearings on control and competitive effects are no more than an exercise in futility" (R. 416). The court stressed that, while determining that the issuance "meets the standards fixed by Section 20a(2)" (R. 415), neither the Commission nor the court had decided "any questions relating to control or competition. They are for the future" (R. 416).

ARGUMENT

INTRODUCTION AND SUMMARY

REA'S financial difficulties have been a source of concern for a number of years to the regulatory

agencies charged with responsibility for its services and to Congress.[7] The origin and nature of those problems have been briefly indicated above (pp. 6–7). The continuing efforts to solve them have been predicated on the belief that REA "occupies a useful place in the transportation of small shipments," that its services are extremely valuable, and that, after a stormy transition, it can establish itself on a sound financial footing. *Express Contract, 1959,* 308 I.C.C. 545, 550.

This background to REA's application for authorization to issue stock under Section 20a is not disputed by any party to these proceedings. Nor has any party challenged the Commission's findings that REA "urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep its operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000"

[7] See *Study of REA Express* issued by Staff Liason Group V-C, Civil Aeronautics Board, Federal Maritime Commission, and Interstate Commerce Commission (August, 1965); S. Rep. No. 1534, 89th Cong., 2d Sess., at pp. 5–7; *House Hearings before the Subcommittee on Postal Rates of the Committee on Post Office and Civil Service on H.R. 12367 and related bills,* 89th Cong., 2d Sess. (at pp. 468–479); *Senate Hearings before the Committee on Post Office and Civil Service on H.R. 14904,* 89th Cong., 2d Sess. (at pp. 623–624); *Express Contract, 1959,* 308 I.C.C. 545.

(R. 200). On that basis, the Commission determined that the issuance met the standards of Section 20a(2). Because those findings were not disputed and because the Commission declined to decide any other questions, there was no reason for the Commission to hold hearings as Section 20a(6) authorizes it to do "if it sees fit, to enable it to determine its decision upon the application for authority."[8]

The fundamental question presented here is whether the Commission violated its statutory mandate or abused its discretion in deciding no more than it did. Appellants urge that, prior to acting on REA's application for authority to issue stock, the Commission was required to consider the questions of control and anticompetitive effect arising from Greyhound's acquisition of the 500,000 shares to be issued, its potential acquisition of additional stock during the 60-day offer, and the possible ultimate implementation of Greyhound's interest in coordinating or consolidating various facilities and services of the two companies. Appellants contend that these considerations should have been assessed either under the "lawful object" and "public interest" standards of Section 20a(2) or under the standards of Section 5(2) and the Clayton Act's Section 7.

No one denies that the present and prospective

[8] Appellants point out (Br. 57) that "if the lower court was correct in holding that the Commission was not obliged to consider the section 7 and section 5 issues, then it was indisputably within the Commission's discretion to pass upon the fiscal aspects of the REA proposal without a hearing." We concur. We also agree with appellants that if, contrary to our view, the Commission was obliged to consider those issues, a hearing probably was needed to ascertain the relevant facts.

arrangements between REA and Greyhound, as reflected in the information supplied the Commission by REA, may entail the acquisition of control of REA by Greyhound and may have a considerable impact on competition. But it also seems evident that a complete assessment of both the control and the competitive effect questions cannot be accomplished at the present time. While, depending upon the attendant circumstances, Greyhound's acquisition of 500,000 shares may or may not constitute an acquisition of control, certainly the full significance of the transaction depends largely on occurrences during the 60-day offer period. During that period it is possible (1) that no shares will be tendered for sale; (2) that up to 1 million shares will be tendered and acquired by Greyhound, giving Greyhound a 60% interest in REA; or (3) that up to 1 million shares will be tendered and one or more of the dissident railroads (including the railroad appellants) will exercise their right of first refusal thus acquiring an interest of up to 50.8% and leaving all the railroads stockholders with an aggregate interest of up to 80%.* Which of these possibilities will be realized, and to

*The dissident REA stockholders include, in addition to appellants, the Missouri Pacific Railway Co., and the Texas & Pacific Railway Co. (R. 86). At the time of the proceedings before the Commission, the dissident railroads together owned 269,880 shares (R. 40), so that if one or more of them acquired the additional million shares they would own 1,269,880 shares out of a total of 2, 499,188, or 50.8% of REA's stock. We are advised that the holdings of the dissident group have subsequently been increased through the acquisition of 23,355 shares by a subsidiary of the Southern Pacific Co. from the Chicago, Rock Island, & Pacific R.R. Co.

what extent, cannot be foretold. Nor can it be determined at this time what effect the outcome will have upon the ability and desire of Greyhound to pursue its interest in consolidating facilities and services with REA.

Under these circumstances, the Commission held that "an investigation of whether the proposed transaction, or further proposed agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time" (R. 198). The Commission went on to make it perfectly clear that it was in no way prejudging any question properly cognizable under Section 5 or Section 7 and that no remedy available under those sections was foreclosed. The Commission stressed that "if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition * * * and that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any * * * application under section 5" (R. 201).

The United States, having requested the Commission to institute an investigation into the competitive consequences that might emerge from Greyhound's financial interest in REA, continues to believe that serious questions on this score remain to be investigated. However, the United States acquiesces in the

Commission's view that in the circumstances of this case such investigation may properly be deferred until all the relevant facts are known after completion of the 60-day offer.

We show below (pp. 21–28) that Section 20a was designed to give the Commission power to prevent carriers subject to its jurisdiction from engaging in fraudulent or improvident financial operations, while Section 5 gives the Commission broad powers to deal with problems of inter-carrier control and the anti-competitive effects thereof. We urge that the language and history of Section 20a, and its rational relationship to Section 5, demonstrates that proceedings under Section 20a cannot properly be made to serve the function of proceedings under Section 5 and that the Commission has power to authorize a securities issue under Section 20a while postponing consideration of issues cognizable under Section 5.

We also show (pp. 28–33) that in postponing consideration of such issues in the circumstances of this case the Commission properly exercised its discretion. We urge that the Section 5 issues involved here can be disposed of more efficiently and intelligently when the full extent of Greyhound's interest in REA is known, that the appellants' interests are not threatened *pendente lite,* that no remedy available to appellants or to the United States has been foreclosed, and that the urgency of REA's need for the proceeds of the stock issue warranted the prompt disposition of its Section 20a application.

I

THE COMMISSION HAS POWER TO AUTHORIZE A SECURITIES ISSUE UNDER SECTION 20a WHILE POSTPONING CONSIDERATION OF QUESTIONS OF INTER-CARRIER CONTROL AND ANTI-COMPETITIVE EFFECT COGNIZABLE UNDER SECTION 5

Section 20a of the Interstate Commerce Act makes the issuance by a regulated carrier of "any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier" (other than short-term notes) and the assumption by the carrier of "any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person" subject to the prior authorization of the Commission. This grant of substantial regulatory power over the financial structure of carriers was enacted in 1920 in response to the fraudulent and improvident transactions in railroad securities that had marked the preceding half-century. "[I]ts dominant purpose was to maintain a sound structure for the rehabilitation and support of railroad credit, and for the consequent development of the transportation system"; it was also intended "indirectly, to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing * * *." Sharfman, *The Interstate Commerce Act* (1931) Part I, 190. See *Chicago, South Shore and Sound Bend R.R.* v. *United States,* 221 F. Supp. 106, 108 (N.D. Ind.). As appears from the report of the House Committee on Interstate Commerce, a subsidiary purpose was to provide a form of financial regulation that would prove more expeditious than the unduly time-consuming proceedings experienced

before numerous State authorities (H. Rep. 456, 66th Cong., 1st Sess., at 21):

> Section 437 gives the commission control over stock and bond issues. * * * Had such provisions been on the statute books during the last 10 years the financial wrecking of such roads as the Frisco, the Rock Island, Pere Marquette, Pittsburgh Terminal, the New Haven, and others, would not have been possible. Provisions similar to those contained in section 437 are found in the statutes of several of the States. The experience of these States with the regulation of stock and bond issues has proven successful. Without Federal Control the carriers would have to be subjected to the diversified requirements of the several States. These requirements have been burdensome to the carriers and resulted in expense and delay. The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action.

Nothing in the language or legislative history of Section 20a suggests that Congress intended the Commission to investigate not only these financial matters but also complex questions of inter-carrier control and competitive effect as a prerequisite to authorizing the issuance of securities or the assumption of liabilities by a regulated carrier. On the contrary, the Congressional interest in the expeditious disposition of applications under Section 20a strongly suggests that to so broaden the scope of inquiry might well defeat the Congressional purpose. Moreover, the very questions

which appellants would force into the text of Section 20a are suitably dealt with elsewhere without creating the risk of unreasonably delaying the raising of funds that may, as in the case of REA, be urgently needed.

While Section 20a controls the right of a carrier to issue securities, Section 5 governs the right of a carrier "to acquire control of another through ownership of its stock or otherwise" or for two or more carriers to merge or act jointly in other ways (Section 5(2)(a)(i)). While Section 20a is addressed solely to the issuance of securities, Section 5 is concerned with control, regardless of whether obtained through the acquisition of securities upon their issuance, or subsequently in the securities market, or "however such result is attained, whether directly or indirectly" (Section 5(4)). The term "control" is defined by Section 5(4) to include "the power to exercise control". As appellants recognize (Br. 52–53), the Commission's reach under Section 5 is extremely broad. It brings within the Commission's purview any transaction that results in "a significant increase in the power" of one carrier over another. *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169. See *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 125.

Furthermore, under Section 5, the Commission is required to weigh a wide range of considerations to which Section 20a does not advert. Thus, under Section 5(2)(c), the Commission must consider, among other things: "(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the

territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transactions; and (4) the interest of the carrier employees affected." In addition the Commission has the duty to formulate and consider other factors which must be satisfied to show that the "proposed transaction * * * will be consistent with the public interest." *Schwabacher* v. *United States,* 334 U.S. 182, 193–194; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 86–88. And, of critical significance here, in a proceeding under Section 5 the Commission must thoroughly canvass the competitive consequences of the transaction, and it may not ignore the antitrust laws. *McLean Trucking Co.* v. *United States.* But if it finds, notwithstanding the anticompetitive consequences, that the acquisition's other advantages to the public interest outweigh its disadvantages, it may approve it and thereby confer immunity from the antitrust laws (Section 5(11)). *Seaboard Airline R. Co.* v. *United States,* 382 U.S. 154, 157. *McLean Trucking Co., supra; Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173.[10] Section 20a, on the

[10] The 1920 amendments to Section 5 contemplated merger of the nation's railroads into a limited number of systems in accordance with a national plan of consolidation to be adopted by the Commission. 41 Stat. 480, 481–482. Although they authorized the Commission to approve mergers and other acquisitions of control, and exempted approved transactions from the Sherman and Clayton Acts, they did not make such acquisitions unlawful if the carrier failed to obtain the Commission's authorization. As a result, transactions which were plainly anticompetitive or which would be inconsistent with the Commission's proposed plan of consolidation could be corrected by the Commission only through proceedings under Sections 7 and 11 of the Clayton Act. See *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 152 I.C.C. 721; *Inter-*

other hand, confers on the Commission no comparable power to relieve a transaction from the operation of the antitrust laws upon a finding that it has advantages outweighing its anticompetitive effects. Thus appellants' contention that the Commission is required to enforce Section 7 of the Clayton Act in a proceeding under Section 20a leads to the anomalous conclusion that a securities issue may have to be disallowed even though it might be the first step in an acquisition of control that the Commission could, on proper findings, authorize under section 5 notwithstanding antitrust considerations.

In sum, an attempt to read the Act as a rational system of regulation leads to the conclusion that questions of intercarrier control and related anticompetitive consequences are appropriately considered in proceedings under Section 5 and need not be determined in the context of Section 20a where neither language nor history suggest they belong. While there may well be circumstances in which it is appropriate for the Commission to proceed simultaneously under both sections, that is not inevitably the case as the circumstances of these proceedings makes clear. The Commission's authority under Section 5 is not diminished by the fact that issuance of the stock to be acquired

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state Commerce Commission v. *Baltimore & Ohio R. Co.*, 160 I.C.C. 785; and *Interstate Commerce Commission* v. *Pennsylvania R. Co.*, 169 I.C.C. 618. This situation was corrected by the Emergency Railroad Transportation Act of 1933, 48 Stat. 218. Congress, which made it unlawful for one carrier to acquire control of another without Commission approval (Section 5(4)), extended the definition of control to subtler forms of domination (Section 5(6)), and authorized the Commission upon its own initiative or upon complaint to take measures to terminate such unlawful control (Section 5(7)).

has been approved under Section 20a, or that the sale has been consummated. It has full power to correct any violation of Section 5 which it might find, including the power to order divestiture. *Central of Georgia Ry. Co., Control,* 307 I.C.C. 39, 43–44; *Welch—Control—Montreal New York Exp.,* 56 M.C.C. 505, 515; *Detroit & C. Nav. Co.—Control—Denver—Chicago Trucking,* 58 M.C.C. 599, 609; cf. *Gilbertville Trucking Co.* v. *United States, supra.* Were there any basis for doubt in this respect, the Commission's order in this case is explicit that its approval under Section 20a decides nothing under any other provision of the Act, and raises no presumption in favor of retention by the acquiring carrier of any interest it may purchase or approval of any relationship that may be created between REA and Greyhound, in violation of Section 5 or Section 7. All that the Commission has done is to authorize REA to issue its stock and gain $10 million in needed financing. Greyhound's relationship to REA in the light of Section 5 and Section 7 is still subject to further scrutiny. Appellants are, therefore, in precisely the same position they would be in if Greyhound were purchasing REA stock on the open market and Section 20a had never come into play.

Our view that Section 20a serves an important regulatory function that is distinct from that of Section 5 was supported before the Commission by at least some of the appellants here. Thus, Transcontinental Bus System Inc. and 16 other bus companies petitioned the Commission to institute proceedings under Section 5, asserting as we do that "[u]nlike Sections 20a and

214, Section 5 does allow, and in fact makes specific provision for, the presentation of the issues necessary for a determination of the question as to whether or not Greyhound should be allowed to consolidate its facilities and operations with those of R.E.A." (R. 67). Moreover, the Commission's power to separate Section 20 issues from Section 5 issues even when they are related is reflected in the protracted dispute over the Commission's jurisdiction to approve a stock issuance by the Alleghany Corp. *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 355 U.S. 415. In that case the Alleghany Corp., which had acquired control of the New York Central Railroad without Commission approval, applied to the Commission rather than the Securities and Exchange Commission for approval of an issue of preferred stock. The Commission took jurisdiction under Section 20a on the ground that Alleghany's control of New York Central made it a carrier within the meaning of the Interstate Commerce Act. The district court set aside the Commission's order however, on the ground that its jurisdiction to act under Section 20a could not rest upon control it had not approved, which is unlawful under Section 5(4). *Breswick & Co.* v. *United States,* 138 F. Supp. 123. This Court held that the Commission had jurisdiction and remanded for consideration of the minority stockholder's claim that the preferred stock issue, as approved by the Commission, was in violation of the Interstate Commerce Act. On remand the district court held that the Commission could not simultaneously approve the stock issue and defer the question of whether it will authorize con-

tinuation of the control upon which its jurisdiction over Alleghany depended. *Breswick & Co.* v. *United States*, 156 F. Supp. 227. This Court again reversed, holding in effect that the control issue did not have to decided before the Commission could approve the stock issuance under Section 20a. *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415. It is clear, therefore, that the Commission need not resolve Section 20a and Section 5 issues contemporaneously even when they are related.

To be sure, there may be exceptional circumstances in which the Commission should proceed at the same time under both sections. But this is not such a case. As we show below, the Commission's decision to defer consideration of questions cognizable under Section 5 in this instance was a reasonable exercise of its discretion.

II

THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN THE CIRCUMSTANCES OF THIS CASE

There are four reasons supporting the Commission's exercise of its discretion is postponing the Section 5 issues raised by Greyhound's proposed acquisition of an interest in REA. First, the Section 5 issues can be disposed of more efficiently when the full extent of Greyhound's interest in REA is known. Second, appellants' interests are not threatened with any immediate likelihood of injury pending Section 5 proceedings. Third, the appellants and the United States have adequate remedies in the courts if the Commission fails to carry out its responsibility to examine all issues of control and competition which exist

at the expiration of Greyhound's 60-day offer. Fourth, REA's need for the proceeds of the stock issue is urgent.

(1) REA's application under Section 20a confronted the Commission with two alternatives. It could either act on REA's application for authority to issue stock, and postpone consideration of the lawfulness of Greyhound's acquisition of an interest in REA for a few months until the full extent of that interest before known; or it could consider the two questions simultaneously. If the Commission had pursued the latter alternative, it might have found that Greyhound's acquisition of a 20 percent interest in a corporation dominated by railroads did not amount to control and that the anti-competitive consequences were insignificant. In that event it would have been obliged to hold a second proceeding a short time later if Greyhound succeeded in increasing its interest in REA or if the two companies agreed upon any plan of coordination or consolidation that posed questions under Section 5 or Section 7. By deferring these questions, it has not foreclosed itself; rather it has facilitated its task. Should Greyhound acquire the majority interest it is seeking, its "control" will be clear and the Commission can weigh the potential anti-competitive consequences claimed by appellants against the potential advantages claimed by Greyhound. On the other hand, if the western railroads make good their threat to exercise their right of first refusal—which is not unlikely (see, *supra,* 8–9), the Commission can more accurately evaluate the significance of Greyhound's interest in

the light of the increased stock ownership of its opponents. If it then finds that Greyhound's acquisition, whatever its final extent, conflicts with Section 5 or Section 7, it can order Greyhound to divest its holdings, impose conditions, or take other appropriate action under Section 5(2).

(2) No imminent competitive injury threatens appellants. What they fear is Greyhound's *ultimate* objective in acquiring an interest in REA—coordination of its facilities and operations with the express company. But the record is clear that it is still far short of achieving that goal. No plan of coordination or consolidation has been agreed upon between the two companies. Whether any such plan can be negotiated in the future remains to be seen.

More important, appellants are mistaken in their assumption (Br. 47) that "the Commission's grant of Section 20a(2) approval * * * forecloses the type of prophylactic relief that this Court has viewed as the most desirable remedy in dealing with probable Clayton Act violations * * *"; there is no reason to suppose that "if the Commission were to institute a proceeding in the future under section 5 (or perhaps under section 11 of the Clayton Act), much of the damage feared by appellants might be done by the time that proceeding ran its normal, protracted course." Under Sections 5(2) or 5(7) and 5(9), upon a proper showing by appellants, the Commission has ample power to grant appellants provisional relief by requiring Greyhound to place its stock in a voting trust or otherwise insulate REA from Greyhound control. See *Gilbertville Trucking Co.* v.

United States, 371 U.S. 115; cf. *Illinois Central R. Co.* v. *United States,* Nos. 687, 688, 689, this Term (January 9, 1967). Further, under Section 5(8) the district courts have jurisdiction "upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary * * *." Nor do we see any reason to doubt that, in the exercise of its authority under Section 11 of the Clayton Act, the Commission may seek a preliminary injunction in the district courts under the All Writs Act, 28 U.S.C. 1651(a). *Federal Trade Commission* v. *Dean Foods, Co.,* 384 U.S. 597.

(3) As we have shown (*supra,* p. 26), the Commission's order in no way prejudges any issue cognizable under Section 5 or under Section 7 of the Clayton Act. Since appellants clearly have no objection to the issuance of securities as such, no right in which they have an interest has been adjudicated and no remedy foreclosed. After the 60-day offer is terminated, Greyhound may well apply to the Commission under Section 5(2). Should it fail to do so, the Commission is free to proceed under Section 5(7),

either upon the complaint of appellants or the United States or upon its own initiative. We see no reason whatever to proceed now upon the assumption that the Commission will abuse its discretion then; but should it do so, the same measure of judicial review that appellants now invoke prematurely will then be available.

(4) Finally, we point to the undisputed fact that REA's need for additional financing to perform its obligations as a common carrier is urgent. The stock issue will produce $10 million in needed equity capital. REA will retain these proceeds even if Greyhound is ultimately compelled to dispose of its interest in it. Certainly it was not unreasonable for the Commission to decide that the public interest was not best served by delaying that financial infusion until proceedings under Section 5 had, in appellants' phrase (Br. 47), run "its normal, protracted course." In view of its precarious financial position, delay of proceedings under Section 20a would have served no purpose but to weaken REA. On the other hand, since the Commission retains full power to terminate any unlawful interest Greyhound may acquire, approval of the stock issue and postponement of the Section 5 proceedings has injured no one.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, provides in pertinent part:

§ 5. *Combinations and consolidations of carriers.*

* * * * *

(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;

* * * * *

(b) Whenever a transactions is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers in-

volved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or

other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

* * * * *

(4) *Control effected by other than prescribed methods.*

It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

(5) *Transactions deemed to effectuate control or management.*

For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) If such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(6) *Affiliation with a carrier defined.*

For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

(7) *Investigation by Commission of effectuation of control by nonprescribed methods.*

The Commission is authorized, upon complaint or upon its own initiative without

complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)—(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

(8) *Jurisdiction of injunctions, etc., against violations of section or orders.*

The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(9) *Supplemental orders by Commission.*

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

* * * * *

(11) *Plenary nature of authority under section.*

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from

any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

* * * * *

Section 20a of the Interstate Commerce Act, 49 U.S.C. 20a, provides in pertinent part:

§ 20a. *Securities of carriers; issuance, etc.*

(1) *Carrier defined.*

As used in this section, the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter, or a sleeping-car company which is subject to this chapter.

(2) *Issuance of securities; assumption of obligations; authorization.*

It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public

as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) *Scope of Commission's authority.*

The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the paragraph (2) of this section.

(4) *Form and contents of application; oath and signature.*

Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

(5) *Disposition of securities described in application, etc.*

Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall,

subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission.

(6) *Notice of application to governors of States; intervention; hearings.*

Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) *Jurisdiction of Commission as exclusive and plenary.*

The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

(8) *Guaranty of securities.*

Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

* * * * *

Section 214 of the Interstate Commerce Act, 49 U.S.C. 314, provides in pertinent part:

§ 314. *Issuance of securities.*

Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs (2) to (11), inclusive, of section 20a of this title (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the value of capital stock or principal amount of other securities to be issued, together with the value of capital stock and principal amount of other securities then outstanding, does not exceed $1,000,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than $200,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of capital stock having no par value, the value thereof for the purpose of this section shall be the fair market value as of the date of its issue; and in the case of capital stock having par value, the value for the purpose of this section shall be the fair market value as of the date of its issue, or the par value, whichever is the greater.

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SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

It appears, in light of appellees' briefs, that no one disputes in this Court that the record establishes that the proposed REA-Greyhound transaction might very well violate section 7 of the Clayton Act and section 5 of the Interstate Commerce Act. Therefore, unless the terms "public interest" and "lawful object" in section 20a(2) are to be construed in a most restrictive, and wholly unprecedented, fashion, the Commission should not have approved the proposed securities issue under that statute without resolving the section 7 and section 5 questions. Perhaps legislative history or policy considerations could indisputably argue against imputing to the Congress the intent disclosed by the words of section 20a(2). But the burden of so demonstrating must surely, in the face of the

statutory language, be heavy indeed. The failure of appellees to meet that burden is, we think, clear on the basis of the considerations discussed in our opening brief. However, it might be useful for us to discuss in somewhat more explicit terms than we have thus far the practical considerations relevant to disposition of the legal issues raised on this appeal. In addition, we should like to add briefly to our analysis of some of those legal issues.

1. All parties call for harmonization of the various statutory provisions involved in this case—sections 20a and 5 of the Interstate Commerce Act and sections 7, 11, and 16 of the Clayton Act—in a situation where the Government concedes, and other appellees assume, that the basic issue is how the Commission should have acted on the section 20a application in the face of a record that established "serious questions on [the] score" of the "competitive consequences that might emerge from Greyhound's financial interest in REA" (Gov't Br. p. 19).[1]

As we read the Government's brief, its position respecting the propriety of approval of the securities issuance

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[1] To be sure, REA asserts that we have "conjured up" a definition of market on the basis of "ancient and specifically overruled case law and a statistical analysis which cries out for repudiation"—an analysis which is "fallacious in the extreme" and "not worth serious attention" (Br. 31). Despite this asserted deficiency in our analysis, however, REA assumes its correctness (Br. p. 32) and remits to an Appendix a demonstration of our error. Accordingly, we rest upon our main brief, the Government's concession, and REA's concession *arguendo*—particularly inasmuch as REA's Appendix does not demonstrate anything other than that REA conducts some business which is not express in a traditional sense—which we also pointed out in our opening brief (p. 32 n. 11)—and that Greyhound does not transport everything that REA does—*e.g.*, corpses, live animals, and baby chicks. We note only that the principle for which we cited *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 135 (1952)—that there are certain fundamental differences between express service and ordinary freight service—was *not* rejected by the reviewing court and was, as REA's own discussion indicates (p. 77 n. 21), reaffirmed by the Commission on remand, 63 M.C.C. 573. For a further indication that there is a "small shipments" market in which REA plays a major role, see the Government's brief at page 16.

without resolution of the section 7 Clayton Act or section 5 Interstate Commerce Act issues is based fundamentally upon two assumptions. The first is that, from the point of view of administrative economy, the Commission's action was desirable because it avoided the possibility of two successive hearings. The second is that no one will be adversely affected by the approval of the 20% acquisition, for a full complement of remedies, principally under section 5, will be available to appellants after expiration of the 60-day offer.

Neither of these assumptions is sustainable. The possibility of repetitive hearings seems remote, for it could materialize only if the Commission were to conclude after the initial hearing that the 20% transaction would violate neither section 7 nor section 5, and if Greyhound thereafter were to acquire a large block of stock pursuant to the 60-day offer. If on the initial hearing the Commission were to find that the 20% transaction would constitute an acquisition of control within section 5, then it could approve or disapprove and that would be the end of the matter. If it found no control but did find a violation of section 7, that would also be the end of the matter since the 60-day offer would never become effective. And if the Commission found neither a section 7 nor a section 5 violation and Greyhound were not to acquire much more stock—as REA says is the likeliest possibility (Br. p. 37)—there would be no occasion for a further proceeding.

Moreover, it is not easy to see why a second hearing, if it had to be held, would be a particularly onerous burden upon the Commission or the parties. At the initial hearing, presumably all of the problems respecting the character of the market and the market positions of REA and Greyhound, as well as all evidence relating to their purpose in entering into the stock transaction, would be explored. What would be left for a second hearing would in all

probability involve merely the question of the extent of Greyhound's stock interest in REA and whatever natural inferences can be made on the basis of that interest.

Finally, in any event, as we have pointed out (Br. pp. 49-50), any possibility of administrative inconvenience could have been eliminated if the Commission had denied section 20a approval on the ground that the "public interest" and "lawful object" findings could not be made on the basis of the existing record, leaving open to REA the right to reapply if the contract were reformed so that the 60-day offer would expire prior to action by the Commission under section 20a. On this point, the Government has not responded.[2]

Nor is it true that, as a practical matter, the Commission's action cannot harm appellants or others who might be affected by the REA-Greyhound relationship. It is, of course, difficult to predict precisely what might happen in the wake of the various possible results of the 60-day offer. We have already discussed the principles involved, and some of the practical possibilities, in our opening brief

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[2] REA does respond, but in the main says simply that if the Commission adopted this approach the contract would have to be renegotiated and this would give dissident stockholders another chance to thwart the transaction (Br. 32-33). Given the distinctly minority position of those stockholders, it is hard to perceive how this could be a danger. REA suggests no business purpose that would be frustrated by having the 60-day offer expire—in the sense that offers to sell would have to be made and rights of first purchase exercised, subject to ultimate Commission approval—prior to the Commission's action on the section 20a application.

REA adds, correctly, that appellants never suggested this approach to the Commission. But this is hardly surprising, since, in view of the Commission's refusal to hold a hearing, the only pleadings appellants had a chance to file were petitions for intervention and petitions for rehearing. Moreover, a section 20a proceeding is not simply a contest between private adversaries. In a section 20a proceeding, the Commission is charged with the responsibility of protecting the public interest; and in such circumstances "the right of the public must receive active and affirmative protection at the hands of the Commission." *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. den.*, 384 U.S. 941.

(pp. 44-48). By way of further illustration, we consider at this point the developments that might occur on one possible set of facts: the failure of Greyhound to acquire any additional REA stock, coupled with the acquisition by minority stockholders of an additional 10% of REA stock.

In such circumstances, a section 7 violation would, as we have already indicated in some detail (*e.g.*, Br. pp. 47-48), be highly probable. However, a section 5 violation might be debatable. Accordingly, the Commission might reject a request that a section 5 proceeding be held, thereby eliminating the possibility of any of the forms of interlocutory relief—*e.g.*, placing the stock in a voting trust—outlined by the Government as available under section 5 (Br. p. 30). Perhaps appellants would ultimately secure a reversal of the Commission's refusal to conduct a section 5 proceeding. Perhaps appellants would not. If they did, perhaps the Commission would at that point grant interlocutory relief. Perhaps it would not. If it did not, it seems highly questionable that appellants could secure judicial review of that interlocutory determination.

If the Commission decided not to hold a section 5 proceeding, it might also decide not to hold a section 11 Clayton Act proceeding on the theory that the increased interests of the dissenting stockholders eliminated any section 7 problem. This would be incorrect; but, as we have indicated (Br. p. 49 n. 23), it seems unlikely that appellants could secure judicial review of that determination. If the Commission did decide to hold a section 11 proceeding but not a section 5 proceeding, it might not attempt to secure a court order providing interlocutory relief insulating REA from Greyhound's influence. If it did make such an attempt, the decision of this Court in *Federal Trade Commission* v. *Dean Foods, Co.*, 384 U.S. 597, might or might not be extended to include this type of

remedy, which is, after all, different from interim relief enjoining consummation of the stock acquisition.

Of course, if a section 5 proceeding were held, and if it were determined that Greyhound had acquired control of REA and that this control should be approved, then as a practical matter it would not be significant that there was probably a section 7 Clayton Act violation, as well as a section 5(4) violation, prior to Commission approval, whether or not the Commission required the establishment of a voting trust during this period. But, as we have indicated, no one can tell whether there would be a section 5 proceeding; if there is such a proceeding no one can tell whether the Commission would find that there had been an acquisition of control; and if it did find an acquisition of control no one can tell whether it would approve that control. In a situation where it appears that the result of such control would be almost a total monopoly of a particular line of commerce, surely the outcome would not be self-evident.

In short, the Commission's action will predictably spawn an extraordinarily complex body of litigation that would involve substantial risks to appellants and to any other parties who claimed injury because of the Greyhound-REA arrangement.[3]

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[3] REA appears to suggest that, even if true, this consideration is irrelevant, since if Greyhound had acquired the stock interest on the open market it could not be blocked under section 20a(2). This is, of course, perfectly true; but it is also perfectly immaterial. A remedy that, on the basis of all other relevant considerations, is available should not be foreclosed on the ground that had the facts been different it would not be available. Moreover, and even more significantly, a section 20a(2) proceeding is not simply, or even primarily, a contest among private parties. It is a proceeding in which the Commission is required to discharge its statutory obligation to secure the public interest. Private parties are permitted to participate, if they have a sufficient interest; and they may of course advance their private interests. But a major justification for their participation is to insure that the Commission is able to, and does, perform its appointed task.

But the danger is not only to appellants. Curiously enough, a serious danger to Greyhound as well as to REA and its stockholders emerges from the Government's contention that REA's need for the purchase money is practically dispositive. Of course, if REA were to be required to refund the money in the event of an ultimately adverse decision by the Commission under section 7 or section 5, the Government's contention would hardly be tenable. But, says the Government, this would not be the result, for "REA will retain these proceeds even if Greyhound is ultimately compelled to dispose of its interest in it" (Br. p. 32). The only theory upon which this supposition can be based is that Greyhound would be compelled to dispose of its REA stock on the open market. But what price could Greyhound expect to receive for the stock of a company with REA's history of unprofitability? Surely an agency or a court could hardly regard a forced sale under such circumstances as very attractive from an equitable point of view.

But the alternative—rescission—seems equally impracticable. For one thing, as we have indicated, repayment by REA of the $10,000,000 would undercut in an *ex post facto* fashion one of the alleged primary justifications for the Commission's going ahead without resolving questions under sections 7 and 5. But, for another, it is evident that the $10,000,000 would have already been used so that REA would be in no position to effect repayment. Perhaps in these circumstances Greyhound's stock could be placed in a voting trust until REA would be able to refund the $10,000,000; but this freezing of $10,000,000 of Greyhound's assets in a wholly unremunerative fashion for what would probably be a very long period of time would also not be very appealing, either to Greyhound or to REA.

In sum, the Government's evident belief that there would be no difficulty in unraveling the REA-Greyhound transac-

tion is unfounded. It may be that counsel for the Government, who appear committed to the retention by REA of the purchase money and imposition of the risk of an open market sale of the REA stock upon Greyhound, would be untroubled by this less than even-handed treatment of the two companies. But this is hardly a guarantee that the Commission or a court would feel the same way.

As against these difficulties that the approach adopted by the Commission may well involve, the approach urged by appellants—resolution of the section 7 and section 5 issues prior to approval of the securities issuance—would be much more sensible. The possibility of illegal competitive damage would be eliminated; if the Commission wishes it could require a simple reformation of the contract that would eliminate any possibility whatever of two hearings; and there would be no necessity of attempting to undo a consummated transaction. To be sure, there would be a risk of damage under this approach also—a risk to REA. If it were ultimately to be decided that there would be no violation of section 7, or if a section 5 proceeding were to be held and the Commission were to approve control by Greyhound of REA, REA during the period of the litigation would be deprived of the use of $10,000,000 that, had the outcome been known from the start, REA could have had much earlier. But the risk, if it falls anywhere, should properly fall upon the party seeking Commission approval of a transaction that, on its face, gives promise of violating the law the Commission is obliged to enforce.

This, we suggest, is the common sense of the matter. We now turn to the legal issues.

2. Both the Government and REA base their legal analysis upon the premise that the considerations embraced within the "public interest" and "lawful object" standards of section 20a(2) do not include either the question whether

a proposed transaction would violate section 7 of the Clayton Act, the question whether it would violate section 5 of the Interstate Commerce Act, or the question whether in broader terms it would result in an undesirable impact on competition. Evidently appellees believe that, unless section 20a(2) is read in such a restrictive fashion, the Commission's determination that the transaction would be in the "public interest" and for a "lawful object" could not reasonably be squared with the Commission's failure to decide section 7 and section 5 issues that are concededly serious. In support of their construction of section 20a(2), both appellees rely upon the legislative history of that provision, upon an asserted conflict between section 20a and section 5 if our construction of the former were to prevail, and upon this Court's decisions in *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 355 U.S. 415.

On this crucial issue of statutory construction, appellees depart from the opinion of the lower court, which believed that this Court in *Alleghany* "left open the question" of the scope of section 20a, and also that in an appropriate case the Commission might be obliged under that section to consider both section 7 and section 5 issues (R. 413-415). While the court erred, in our view, in its ultimate judgment, it was more nearly correct in its conception of the reach of section 20a, and in its appraisal of the *Alleghany* litigation, than appellees.

a. As to the legislative history of the provision, surely, in light of the statutory language, there is a heavy burden upon appellees to show that the Congress intended to exclude from Commission consideration probable Clayton Act and section 5 violations that in any normal sense *are* material to the "public interest" and to the "lawful object" of the proposed transaction. The legislative history relied upon by appellees does not meet this burden. It shows only

that the Congress was, as we have agreed, primarily concerned with the fiscal aspects of proposed securities transactions. It certainly does not show that the Congress intended that the Commission be *exclusively* concerned with that problem. If the Congress intended that the Commisson restrict its scrutiny of a proposed transaction in such fashion, the Congress surely selected strikingly inept language—"public interest" and "lawful object"—to express its intention.

Moreover, there is legislative history that affirmatively suggests that the Congress, in enacting section 20a, was concerned about the possible anticompetitive impact of securities issuances. We do not contend that this legislative history is by itself conclusive. But it does significantly undercut any contention that the Congress intended that the scope of section 20a be less than the scope indicated by the language of the statute.

We set forth in Appendix A a detailed discussion of this legislative history. In general, what it amounts to is this: The history of section 20a, which was passed in 1920, is comprised largely of the history of substantially identical bills that the House had enacted in 1910 and in 1914, and had considered in 1916. In 1910, while the House passed a bill containing a securities regulation provision, the Senate's version of the legislation prevailed. That version substituted for the securities issuance provision a provision that created a commission to investigate "questions pertaining to the issuance of stocks and bonds by railroad corporations." The commission's report, which was submitted in 1911, condemned the intercorporate stockholdings that existed among railroads as an impediment to competition unaccompanied by the advantages of economy that might accrue through outright merger, and urged that the Congress require disclosure of securities transactions among

carriers and affiliated holdings companies. When the 1914 bill was debated in the House, one of its supporters observed that the provision accomplished the "results which the Hadley Commission stated as desirable." And in observing that the Republicans supported the bill, Representative Esch, the author of the provision that eventually became section 20a six years later, noted President Taft's recommendation that railroads be forbidden directly or indirectly from acquiring "any interests of any kind in capital stock" of a competing carrier. Taken together, these elements of legislative history indicate that one of the aspects of securities issuances that concerned the Congress was the anticompetitive impact of intercorporate holdings.

b. Next, the Government suggests that, because of the role that the Congress has assigned to the Commission under section 5, this court should conclude that there is no overlap between that provision and section 20a(2) in terms of consideration by the Commission of the anti-competitive impact of a proposed transaction (Br. pp. 22-25). We agree, as we have indicated, that section 20a(2) was not enacted for the explicit purpose of enabling the Commission to deal with violations of the Clayton Act—section 11 was enacted for that purpose—nor with the anticompetitive impact of stock acquisitions in a more general sense in a "control" situation —section 5 was enacted for that purpose. But neither the language employed by the Congress in section 20a(2) nor the legislative history of that provision, as we have also indicated, suggests any conclusion other than that the Congress intended the Commission, when faced with a section 20a(2) application, to consider *all* aspects of the "public interest," which would certainly normally include possible violations of other statutes that the Commission is required to enforce, such as section 7 and section 5. Thus, for the Government's contention to have any force, the Govern-

ment would have to demonstrate that there is a genuine conflict between the purposes of section 20a(2) and of sections 5, 7, and 11.

The Government's effort to establish that there is such a conflict is without merit. First, the Government suggests that, if probable violations of sections 7 or 5 are considered in a section 20a(2) proceeding, there might be "a risk of unreasonably delaying the raising of funds that may, as in the case of REA, be urgently needed" (Br. p. 23). But, for the reasons outlined in the prior portion of this brief, the interests of the carriers are hardly served by permitting consummation of a transaction that might later have to be undone. Moreover, to test the merit of the Government's contention respecting conflict between section 5 and section 20a(2), consider what would happen in terms of section 5 alone if the proposed acquisition involved 60% of the REA stock instead of 20%. Certainly, whatever REA's need for funds, no one could suggest that, in the face of the plain language of subsections 5(2) and 5(4), the parties could consummate the transaction without a determination by the Commission, after the procedures specified by section 5, that the acquisition of control should be authorized. But if expedition in equity financing is not a necessary hallmark of a section 5 proceeding, why should it be of a section 20a proceeding that raises serious section 5 and section 7 questions?

The Government's other suggestion respecting the inconsistency between section 20a(2), as we construe it, and section 5 is based upon the consideration that section 20a(2) does not empower the Commission to immunize a transaction from the antitrust laws, whereas section 5 does. Accordingly, says the Government, "appellants' contention that the Commission is required to enforce Section 7 of the Clayton Act in a proceeding under Section 20a leads to the anomalous conclusion that a securities issue may have to be

disallowed even though it might be the first step in an acquisition of control that the Commission could, on proper findings, authorize under section 5 notwithstanding antitrust considerations'' (Br. pp. 24-25).

As this statement clearly implies, this ''anomaly'' could occur only where the transaction involved less than ''control,'' since otherwise a section 5 proceeding would obviously be held together with the section 20a(2) proceeding.[4] But if that be so, then the argument assumes the total inapplicability of section 7 to the land transportation industry, for otherwise there could hardly be anything ''anomalous'' about denying section 20a(2) approval on the ground that the transaction would violate section 7. Certainly there is no authority supporting this notion of the irrelevance of section 7 to transactions between carriers where section 5 is inapplicable, whether or not the intent of the acquiring carrier is that the transaction is ''the first step in an acquisition of control.'' [5] The plain language of section 11, which obliges the Commission to enforce section 7, establishes the want of merit of the Government's position.

If there is any anomaly, in short, it does not proceed from our construction of section 20a(2), but from the interrelationship between sections 7 and 11 of the Clayton Act and section 5 of the Interstate Commerce Act. It is plain from those provisions that the Commission must enforce section 7 against carriers and may not immunize carriers from that statute except in a ''control'' situation. It could

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[4] The Government no longer suggests, as it did in its Motion to Affirm (p. 12), that any violation of section 7 would necessarily involve a violation of section 5. For a detailed discussion of that question, see our Reply to Motions to Affirm, pp. 11-14.

[5] This is not to say that this factor—whether achievement of "control" appears reasonably predictable and whether in the Commission's view such "control" would be desirable—would not be relevant, together with questions such as whether a voting trust had been established as an interim arrangement, in determining whether there is in fact a violation of section 7.

be suggested that this is not very sensible, since the result is that the Commission may immunize where the stock acquisition is large enough to confer control but must enforce section 7 where the acquisition is not that substantial. But, we repeat, this result has nothing to do with whether the Commission must consider section 7 violations in a section 20a(2) proceeding, for in any event it must consider such violations in a section 11 proceeding. Moreover, it is certainly arguable that the result is not at all incongruous. The Congress may have believed that the benefits that may flow from an acquisition of control or a merger in terms of such matters as economy of operation—the benefits that may offset damage to competition—cannot be assured in a situation where the relationship between the two companies amounts to less than control of one by the other. *Cf.* Railroad Securities Commission Report, H. Doc. 256, 62d Cong., 2d Sess. (1911), pp. 20-21.

c. Finally, as to *Alleghany*, that decision is irrelevant even if appellees read it correctly. Appellees maintain that in *Alleghany* this Court held that the Commission was not obliged to consider a section 5 "control" question in the context of the section 20a(2) proceeding there involved. But such a view would be wholly compatible with our arguments in the case at bar because of the character of the "control" issue in *Alleghany* as it related to the securities issue.

The securities issue in question was simply an exchange by Alleghany of one type of its own preferred stock for another type that was outstanding. See *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 158. The "control" question was whether or not it should have secured Commission approval of its *prior* acquisition of stock in the New York Central. Thus, as the Commission pointed out in its Jurisdictional Statement (p. 2), the one really had nothing to do with the other. More particularly, the stock to be issued

with the Commission's approval was not to be employed as a means of acquiring control over the New York Central or over any other carrier. The burden of our argument in the case at bar is, not that every past misfeasance of an applicant need be considered in a section 20a(2) proceeding, but simply that, where it is asserted with good reason that the issuance of the very securities in question will result in "control" or in a violation of section 7 of the Clayton Act, the Commission cannot give section 20a(2) approval without considering the section 5 and section 7 issues. The facts in *Alleghany* bear no resemblance whatever to such a situation, and the opinion, however read, contains no suggestion that our view is incorrect.

To this point we have assumed that appellees are correct in asserting that, in its one sentence *per curiam* in *Alleghany*, this Court held that the question of Alleghany's prior acquisition of control of the New York Central was not relevant to Alleghany's later section 20a(2) application to exchange one type of its preferred stock for another. However, the fact of the matter is that appellees have not correctly read this Court's *per curiam*. In our view, in that decision the Court did not intend to construe section 20a(2) at all. Rather, it simply ruled that, as no party had contended in the previous litigation in this Court that the legality of Alleghany's control of the New York Central was relevant to the propriety of the securities issue under section 20a(2), that contention was not open after this Court's remand.

We realize that the question whether our interpretation of the *per curiam* is correct rather than appellees' cannot be decided by reference to the *per curiam* alone, which simply stated:

> "The judgment of the District Court is reversed and the case is remanded for consideration by that

> court of the only claim that was left open at this Court's prior disposition of this litigation, to wit, whether 'the preferred stock issue as approved by the [Interstate Commerce] Commission was in violation of the Interstate Commerce Act.' " 355 U.S. 415, 416.

Rather, as the opinion indicates, its meaning is to be discerned only by way of an analysis of the prior stages of the litigation, which are extremely complex. Since, for the reasons already set forth, *Alleghany* is irrelevant under any reading, we will not extend the body of this brief by a complete discussion of *Alleghany*. Rather, we attach hereto Appendix B in which such a discussion is set forth. At this point, we state only in a general fashion the basis for our view of *Alleghany*.

In its first opinion in *Alleghany*, 353 U.S. 151, the Court, after holding that the Commission had jurisdiction to regulate Alleghany (*and hence jurisdiction to pass upon the* securities issue), concluded by stating that the case had to be remanded "for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act." *Id.*, at 175. Appellees' reading of the subsequent *per curiam* rests upon the supposition that this "appellees' claim," which was left open for consideration, involved the question whether the legality of Alleghany's control of the New York Central was relevant to the propriety of the securities issue.

However, as the briefs in the first *Alleghany* case make clear (see App. B *infra*), the "appellees' claim" under section 20a(2) had nothing to do with "control" questions, but was simply a contention—set forth at some length on brief—that the securities issue was fiscally unsound. That, then, was the only issue left open by this Court under its

mandate; and by its *per curiam* reversal of the District Court's decision on remand this Court meant nothing more than that the District Court, in considering the question of "control," had exceeded the scope of the mandate. In short, the appellees in *Alleghany*, not having urged at the first hearing in this Court that, even if the Commission had jurisdiction to regulate Alleghany, it should not have approved the securities issue because Alleghany was illegally in control of the New York Central, could not prevail on that ground after remand.

3. The foregoing deals with the major contentions advanced by appellees. There remain several peripheral points.

a. Considerable stress is placed by appellees upon the Commission finding that REA "urgently needs" $10,000,000 "in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level," and that REA "is handicapped in borrowing . . . because of its unfavorable debt-equity ratio." We have already indicated why these considerations are not material either as a practical matter or as a matter of law. We add also that there is nothing in the record—and no Commission finding—establishing that Greyhound was the only source to whom REA could turn. Moreover, there is not any detailed showing in the record as to how badly REA needs the money. To be sure, REA told the Commission what it wanted to do in terms of new capital expenditures; but it made no particularized showing as to what degree it expected to be benefitted by the expenditures or harmed if it could not make them. We do not suggest that the conclusory statements of need and advantage submitted by REA were an insufficient basis for Commission approval of the *fiscal* aspects of the proposed transaction.

We do suggest that the data does not furnish a sound basis for suggesting that scrutiny of the prospective anticompetitive impact of the transaction should properly have been deferred on something akin to a "failing company" theory.

b. Appellee REA contends that the findings requirement of section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1009(b), does not apply to section 20a proceeding because the latter section does not compel a hearing; it permits the Commission to conduct one "if it sees fit" (REA Br. p. 55). We have urged, however, that refusal to conduct a hearing in this case constituted an abuse of Commission discretion under section 20a (Br. 57), which the Government suggests was "probably" the case if the Commission was obliged, as we contend, to consider the section 7 Clayton Act and section 5 Interstate Commerce Act issues (Gov't Br. p. 17 n.8). If the Commission did abuse its discretion, it was "required by statute," 5 U.S.C. §1006, to hold a hearing, and section 8(b) applied. *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 50; *Riss & Co.* v. *United States,* 341 U.S. 907, reversing *per curiam,* 96 F. Supp. 452 (W.D. Mo. 1951).

Moreover, even if section 8(b) is not applicable, the Commission was still obliged adequately to articulate the reasons for its decision. In *Coffey* v. *Jordan,* 275 F.2d 1, 2 (D.C. Cir. 1959), the court ruled that even though the applicable statute contained no express requirement for findings,

> " 'the practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement.' 2 Davis, Administrative Law Treatise §16.05 (1958). See e.g., Securities and Exchange

Commission v. Chenery Corp., 1943, 318 U.S. 80, 63 S. Ct. 454, 87 L.Ed. 626; Boudin v. Dulles, 1956, 98 U.S. App. D.C. 305, 235 F.2d 532; National Labor Relations Board v. Capital Transit Co., 1955, 95 U.S. App. D.C. 310, 312-313, 221 F.2d 864, 867; Jordan v. American Eagle Fire Ins. Co., 1958, 83 U.S. App. D.C. 192, 198, 169 F.2d 281, 287 (dictum); Saginaw Broadcasting Co. v. Federal Communications Comm'n, 1938, 68 App. D.C. 282, 287, 96 F.2d 554, 559; . . ."

We reiterate that, whether under section 8(b) or under the *Chenery* doctrine, and putting aside the failure of the full Commission to state that it was adopting the order of Division 3, that order was infirm. The Government says not a word about this issue; REA contends that "Paragraphs 7 through 10 of the Commission's order recite quite clearly why such [section 7 and section 5] investigations would not be appropriate at this time" (Br. p. 27). The difficulty with this argument is that those paragraphs (R. 199-200) recite indiscriminately a large number of facts, many of which are totally irrelevant to any conceivable explanation of the Commission's action in refusing to consider section 7 and section 5 questions. Nor does the Division state that these paragraphs, or any other paragraphs, set forth the reason for its action.

c. We have assumed thus far in this reply brief that Division 3's order does not contain a finding respecting section 5. However, we reiterate our position that that order does contain such a finding. The Government has not responded directly to this question, and all that REA says is that we have subjected the order "to much abuse" and that the "Commission obviously was simply reciting the reasons why it was appropriate to reserve the question of control until after the tender offer" (Br. p. 28). But

the "reasons" given in the pertinent portion of the order (R. 200-201) were, so far as we can tell, simply that the 20% transaction would not result in control. As the Commission put it, after reciting the facts that indicated, in the Commission's view, the limited power that Greyhound would have, "control or power to control must be real and not based on conjecture or remote possibilities" (R. 200-201). If our reading is correct, then no one questions that the Commission applied an erroneous test of control. See particularly the Government's brief p. 23. Moreover, no rational basis has been suggested for the Commission's considering section 5 questions in the section 20a proceeding but not section 7 questions.

Conclusion

For the reasons set forth in this brief, as well as in our opening brief, the judgment below should not be sustained.

Respectfully submitted,

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APPENDIX A

Legislative History of Section 20a(2).

Section 437(1) of H.R. 10453 (66th Cong.) was enacted without substantial change in 1920 as section 20a(2). The House Committee report stated, "In 1914 and again in 1916 the House passed bills containing almost the identical provisions now embodied in section 437. These provisions are familar to the House and need not be dwelt upon." H.Rep't 456, 66th Cong., 1st Sess. (1919) at p. 21. And Representative Esch, the author of the bill, asserted with reference to the securities regulation subsections of Section 437 that the House had passed "almost this identical legislation" in 1910, in 1914 and in 1916. 58 Cong. Rec. 8317-18.[1] Hence, it seems fair to say that Congress intended section 20a(2) to fulfill the same purposes to which the earlier, "almost identical," bills had been directed.

Section 13 of H.R. 17536 (61st Cong.), as that bill passed the House in 1910, sought generally to regulate the issuance of railroad securities.

The Senate voted the securities regulation section out of the bill and inserted in its stead a provision that became section 16 of the Mann-Elkins Act of 1910 and which created a commission to investigate "questions pertaining to the issuance of stocks and bonds by railroad corporations." 36 Stat. 556. This commission was officially known as the Railroad Securities Commission but was commonly called the Hadley Commission, after its chairman.

The Report of the Railroad Securities Commission, H. Doc. 256, 62d Cong. 2nd Sess., was submitted in 1911. The chairman's letter of transmittal declared that the Commission had confined itself "to the consideration of questions connected with the issuance of stocks and bonds by railroad corporations." *Id.* at p. 6. Among such questions dealt

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[1] The 1916 bill, H.R. 563 (64th Cong.), was reported to the House floor as identical to the bill the House had passed in 1914. 54 Cong. Rec. 500 (statement by Representative Rayburn). For that reason, presumably, it was not debated, nor, insofar as we can ascertain, was it passed by the House, Representative Esch's statements to the contrary notwithstanding.

with in the Report was the problem of "Control by Intercorporate Holding." *Id.* at p. 20. The Commission noted that more than 20% of outstanding railroad capital was held by railroad companies themselves, and that a large additional amount of railroad securities was owned by holding companies that controlled the policy, and directed the operations, of the carriers whose shares they held. The Commission condemned these intercorporate holdings as "a public evil," declaring that where one railroad controls the operations of another by owning a majority of its stock or where a holding company controls the operation of several roads in the same manner, "all the disadvantages of consolidation" are realized "without getting all of its advantages." *Id.* at pp. 20-21. "[C]entralization of financial power" is achieved, but not the "economy of operation which should go with it." The Commission also branded as "specific evils" resulting from control through intercorporate shareholdings the preference apt to be given to the interests of the intercorporate system as a whole as against the separate interests of each constituent carrier, and the fact that united control but separate organization invited the concealment of financial transactions. *Id.* at 21. The Commission urged as a solution to this problem that Congress require disclosure of securities transactions among carriers and affiliated holding companies, but concluded that any more stringent regulation should be avoided. *Id.* at pp. 28-29.

It stands to reason that Congress' next real effort in this area, H.R. 16586 (63d Cong.), would not, and it did not, ignore the evils of control by intercorporate shareholding revealed by the Hadley Commission. Thus, Representative Stevens observed that H.R. 16586 accomplished the "results which the Hadley Commission stated as desirable." 51 Cong. Rec. 9802. And Representative Esch coupled President Taft's recommendations (a) that railroads be forbidden directly or indirectly from acquiring "any interests of any kind in capital stock" of a competing carrier and (b) that no railroad be permitted to issue stock or bonds at less than par or fair value as evidence that the Republican Party favored the pending bill. 51 Cong. Rec. 9791. Representa-

tive Eagle stated that H.R. 16586 was "one of the three bills making up" the Democratic Party's "antitrust program." 51 Cong. Rec. 9813. The other two were the bills that became the Federal Trade Commission and Clayton Acts. Representative Barkley observed that among the purposes of H.R. 16586 was to require the Commission "to ascertain whether the proposed issue is for a purpose permitted under the law for they [sic] could not authorize a carrier to involve itself in any indebtedness which the laws would not permit it to incur." 51 Cong. Rec. 9827. He did not suggest that the antitrust laws were excepted from the "laws" under which the validity of a securities issuance was to be judged.

H. R. 16586 listed a number of appropriate purposes for a securities issuance, including "[E]xtensions and improvements" of the issuer's lines. 51 Cong. Rec. 9827. The Senate Committee on Interstate Commerce went somewhat further. It recommended amendment of H.R. 16586 to permit a carrier, with Commission approval, to issue securities for the "lawful acquisition of the property of or interest in another common carrier corporation." S. Rep't 706, 63d Cong., 2d Sess. (1914) at pp. 4-5. Plainly, the Commission would have to determine the lawfulness of the acquisition and deny approval if the acquisition violated the antitrust laws. For the Senate version also contained a provision prohibiting, *inter alia,* any rail carrier from acquiring at any time securities of a corporation owning, controlling or operating another railroad, unless the Commission found that the acquisition would not impair the ability of either carrier to perform its service to the public. *Id.* at p. 6.

We submit that the origins and history of section 20a reviewed above indicate that when Congress enacted that provision upon the understanding that it was "almost identical" to the three earlier bills going back to 1910, Congress meant to require the Commission to examine the impact of a proposed securities issuance upon competition and to determine the lawfulness of the transaction under section 7 of the Clayton Act and section 5 of the Interstate Commerce Act.

APPENDIX B—The Alleghany Case

In this Appendix, we summarize the *Alleghany* litigation as it bears upon appellees' view that the Supreme Court's second *Alleghany* decision was based upon a holding that the question of the legality of Alleghany's control of the New York Central was irrelevant to the Commission's decision to approve a securities issue by Alleghany. Our contrary view, as stated in the text of this reply brief, is that the Supreme Court's one sentence *per curiam* was based simply on the ground that the issue of control was not open under the Court's mandate in the first *Alleghany* decision.

The genesis of the *Alleghany* litigation was a controversy between Alleghany and a group that held stock in both Alleghany and the New York Central. Alleghany had ousted the old New York Central management in a proxy fight, and evidently the complaining stockholders were of the view that those in control of Alleghany were mishandling both its affairs and the affairs of the New York Central.

Among the battery of complaints filed against Alleghany in the Commission, see *Louisville & J. B. & R. Co. Merger*, 290 I.C.C. 725, 729-730 (1955), the one that finally ended in the Supreme Court centered upon the efforts of the dissident stockholders to subject Alleghany to the presumably more stringent supervision of the SEC in place of the ICC. Alleghany was an investment company, and hence would normally have been regulated by the SEC; but in a prior proceeding relating to Alleghany's control of the Chesapeake & Ohio, the ICC had exercised its authority under section 5(3) of the Commerce Act to rule that Alleghany was to be "considered as a carrier" for purposes of a number of regulatory provisions of the Act, including the provisions such as section 20 dealing with securities. See *Chesapeake & O. Ry. Co. Purchase*, 261 I.C.C. 239, 262 (1945). This ruling afforded Alleghany an exemption from regulation by the SEC. When Alleghany disposed of its Chesapeake & Ohio holdings, its opponents, with the support of the SEC, attempted in the *Alleghany* litigation to have SEC jurisdiction reinstated.

The vehicle chosen by Alleghany's opponents to press their attack was a challenge to two orders of the Commission. The first was a "status order" in which the Commission determined that Alleghany was to be "considered as a carrier" despite its sale of Chesapeake & Ohio stock. That determination was made in the context of a section 5(2) proceeding instituted by Alleghany and the New York Central seeking, *inter alia,* ICC approval of the merger of one subsidiary of the New York Central into another. In the second order, the ICC exercised its jurisdiction over Alleghany arising from the status order and approved under section 20a(2) a securities issue by Alleghany. While the two orders were not related, the securities order was, as the Supreme Court ultimately held, necessary to give the plaintiffs standing to attack the "status order," since until the Commission exercised its jurisdiction over Alleghany in some fashion having a material impact upon the plaintiffs they would have no basis to challenge the ICC's jurisdictional determination. 353 U.S., at 159-160. Thus, the three-judge court action was grounded upon both orders. Up to the first decision by the Supreme Court, however, the attention of the courts was focused primarily upon the status determination, not upon the securities question.

As to the status determination, the statutory question was whether Alleghany, a non-carrier, had acquired control of two or more carriers within the meaning of section 5(2)(a)(i). If so, the Commission had the right under section 5(3) to rule that it should be regulated as a carrier. The Commission held that Alleghany controlled the New York Central, and also that the result of the merger of the New York Central subsidiaries approved by the Commission in the section 5(2) proceeding would be that Alleghany would acquire control over a second carrier, *i.e.,* over the merged subsidiary. Therefore, the Commission concluded it had authority under section 5(3) to assume jurisdiction over Alleghany, and accordingly it approved the merger of the subsidiaries. *Louisville & J.B. & R. Co. Merger,* 295 I.C.C. 11 (1955).[1] Two days later, in the exercise of its

[1] The prior report by Division 4 is reported at 290 I.C.C. 725.

jurisdiction over Alleghany, the Commission approved the section 20(a) securities application in an unreported order. See 353 U.S., at 158.

The District Court set aside both orders, holding that the merger of the subsidiaries simply rearranged the corporate structure of companies already under common control, and that such a rearrangement could not result in a new acquisition of control. *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (S.D.N.Y. 1955).[2] Therefore, whatever might be said about Alleghany's control of the New York Central, the Commission's determination that Alleghany had acquired control of a second carrier—the merged subsidiary —was erroneous; the status order in consequence was without effect; and the Commission lacked jurisdiction to approve the securities issue.

By way of alternative holdings set forth in an Appendix, *id.*, at p. 136, the court also discussed the matter of Alleghany's control of the New York Central. It was of the view that the Commission's findings that Alleghany had acquired effective control were inadequate. Moreover, the court believed that, even if Alleghany did control the Central, that relationship could not be considered as part of the basis for a section 5(3) status determination because Alleghany had not, but should have, secured Commission approval of its purchases of Central stock. The Commission had held in this connection that approval was unnecessary because a non-carrier may acquire control of a single carrier without Commission approval and because the New York Central System should be treated as a single carrier for these purposes. 295 I.C.C., at 17. The court, however, believed that the System had to be regarded as a multitude of separate carriers, and hence that Commission approval was required.

This Court reversed the District Court. *Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151. First, it agreed with the Commission that the change in corporate relationship resulting from the merger resulted in Alleghany's acquiring

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[2] A prior opinion on a hearing respecting a preliminary injunction is reported at 134 F.Supp. 132.

control of the merged subsidiary within the meaning of section 5. Second, it upheld the Commission's finding that Alleghany had acquired control of the Central. And third, it found it unnecessary, for purposes of testing the status order, to decide whether approval of the acquisition of the Central should have been secured, because the statute did not in terms forbid the Commission from entering a status order where the non-carrier's control of carriers was illegal and because it would not be good policy to oust the Commission of regulatory jurisdiction because the non-carrier had failed to abide by the law.

The important consideration for present purposes is that nowhere in this Court's opinion—or for that matter in any opinion in the District Court or in the Commission—was there any discussion of the scope of section 20a(2). More particularly, the Court said not a word about whether the legality of Alleghany's control of the Central might be relevant to the securities application under section 20a(2) except as it bore upon the Commission's jurisdiction. This is quite understandable, since, as the briefs in this Court disclose, no party advanced any argument along those lines. Rather, the issue of control was discussed only in terms of its relevance, or irrelevance, to the jurisdiction of the Commission to regulate Alleghany.

The appellees did, however, make two arguments in this Court respecting the securities issue, and it is in the light of those arguments that the otherwise rather cryptic remarks by this Court relied upon by REA and the Government become clear. First appellees argued that they were entitled to a hearing under section 20a(2). To this, the Court replied that section 20a(6) provides that "The Commission may hold hearings, if it sees fit. . . ." *Id.*, at 175. And the lower court on remand said that "the Commission has almost free discretion as to how it may best proceed with its investigation." 156 F. Supp., at 230. But it is perfectly clear that this procedural issue is unrelated to the substantive issue as to the considerations that should be dealt with under section 20a(2).

Appellee's second section 20a(2) contention was that the securities issue was fiscally unsound. After a lengthy discussion of the matter, appellees concluded:

> "If, on the other hand, this Court upholds the jurisdiction . . : the District Court will have to consider the preferred stockholder plan, approved by the I.C.C.'s Section 20a order, on the merits. It will thus either concur or disagree with the S.E.C.'s findings that the plan is 'grossly unfair' to the common stock and 'potentially deceptive' to investors and offends against the 'public interest.' Whether it will first remand the plan to the I.C.C. for an evidentiary hearing or review it on the present record will also have to be determined. Any final order it makes will of course be subject to appeal to this Court" (Brief, p. 129).

Since this was the only section 20a(2) argument made by appellees, apart from the procedural question noted above, it is clear that this is the contention the Court referred to in what is for present purposes the key, penultimate sentence of the opinion:

> "For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of *appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act.*" 353 U.S., at 175. (Emphasis added.)

On remand, however, the District Court went beyond the terms of this mandate. *Breswick & Co.* v. *United States*, 156 F. Supp. 227 (1957). While it rejected the section 20a(2) claim made in the Supreme Court respecting the fiscal soundness of the securities issue—the only claim the Supreme Court had authorized it to consider—it again reversed the Commission on the ground that Alleghany was illegally in control of the New York Central. The court reasoned that, while the Supreme Court had held that the legality of control of the Central was irrelevant to the ques-

tion of the *jurisdiction* of the Commission, it had not held that this consideration was irrelevant to the *merits* of the Commission's determination under section 20a(2) that the securities issue should be approved.

The court was correct in its view that the Supreme Court's holding respecting Alleghany's control of the New York Central related only to the Commission's jurisdiction, not to the merits of the Commission's section 20a(2) order. However, the court erred in deciding the merits of the 20a(2) order on the basis of the illegality of Alleghany's control of the Central, because, as we have indicated, appellees had not made such a claim in the Supreme Court and the Court's mandate limited further proceedings to the claim respecting the fiscal soundness of the securities issue. Hence, on appeal the Supreme Court reversed summarily, simply repeating what it had said before as to the scope of the remand. *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415.

In short, this Court did not, in this final one sentence *per curiam*, construe section 20a(2) at all; it merely applied the rule that, since the appellees had not raised an issue in the previous Supreme Court litigation, it was not open on remand. One may perhaps speculate that the Court's view of the propriety of applying that rule was strengthened by a feeling that the District Court was attempting to circumvent this Court's reversal of its former judgment.

SUPREME COURT OF THE UNITED STATES

No. 305.—October Term, 1966.

The Denver and Rio Grande Western Railroad Co. et al., Petitioners, *v.* United States et al.	On Appeal From the United States District Court for the District of Colorado.

[June 5, 1967.]

Mr. Justice Brennan delivered the opinion of the Court.

The question in this case is whether the Interstate Commerce Commission complied with its statutory responsibilities under § 20a of the Interstate Commerce Act [1] when it approved without consideration of control or anticompetitive consequences the issuance to appellee Greyhound Corporation of 500,000 shares of the common stock of appellee Railway Express Agency, Inc. (REA).

[1] Section 20a of the Interstate Commerce Act, 49 U. S. C. § 20a, provides in pertinent part:

"(2) It shall be unlawful for any carrier to issue any share of capital stock . . . even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, . . . the commission by order authorizes such issue . . . . The commission shall make such order only if it finds that such issue . . . (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or approproate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Common carriers by motor vehicle are made subject to the provisions of § 20a (2) by § 214 of the Act, 49 U. S. C. § 314.

REA provides railroad express service and is also a motor common carrier. The approximately 2,000,000 shares of REA common stock outstanding are entirely owned by railroads and no railroad stockholder may dispose of its shares without first offering them to the other railroad stockholders. REA also is authorized, however, to issue 500,000 additional shares of common stock without first offering them to its stockholders. Greyhound, which operates an express carrier service through its wholly owned subsidiary Greyhound Lines, Inc., a motor carrier of passengers and express subject to the Interstate Commerce Act, agreed to purchase these 500,000 shares. REA thereupon applied to the ICC for an order under § 20a approving the transaction. Minority railroad REA stockholders, motor bus competitors of Greyhound, motor carriers, and freight forwarders intervened in the proceeding to protest against approval of the transaction. They alleged, among other things, the necessity of a hearing on the questions whether Greyhound's acquisition of the stock was in the "public interest" and for a "lawful object" as those terms are used in § 20a. The ICC approved the acquisition without a hearing. A three-judge District Court for the District of Colorado sustained the ICC order. 255 F. Supp. 704. We noted probable jurisdiction. 385 U. S. 897. We reverse with direction to the District Court to enter a new judgment remanding the case to the ICC for further proceedings consistent with this opinion.

I.

REA was organized in 1929 and until 1961 operated on a nonprofit basis under a pooling agreement with the railroads. See *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I. C. C. 423. Financial difficulties forced abandonment of the nonprofit operation and REA was converted to a profit and loss basis

in order to effect more efficient and economic operation. See *Express Contract, 1959,* 308 I. C. C. 545, 549–550. In addition, REA was released from restrictions against use of carriers other than railroads. In 1963 REA's by-laws were amended to eliminate a limitation against stock ownership except by railroads; the disposition of shares by a railroad, however, was made subject to the right of first refusal of the other railroad stockholders. The issuance of 500,000 additional shares not subject to the right of first refusal was also authorized, but only upon the consent of two-thirds of the railroad stockholders.

Greyhound, principally a passenger carrier, became interested in expanding its growing express business. In January 1964 Greyhound offered to purchase, subject to ICC approval, at least 67% of REA's stock, of which Greyhound intended to offer 16% to major airlines. Greyhound also agreed to finance part of REA's capital requirements as part of a plan to coordinate the express services of both companies. This proposal was defeated by railroad stockholders.

REA and Greyhound persisted in their efforts to coordinate their operations. Greyhound proposed to acquire a 20% interest in REA through acquisition of REA's 500,000 authorized but unissued shares, stating that its "interest in REA . . . stems primarily from our views as to the improvements . . . which could be realized through combination and correlation of certain of our facilities and services." Greyhound offered to pay $16 per share if permitted to name one-fifth of the REA Board of Directors and if the REA Board would declare its intention "to consider seriously, and work toward a long term agreement between REA and Greyhound to consolidate operating functions and facilities . . . ," and if, further, the REA Board would agree "to consider seriously at a later time . . ." the sale of REA stock to airlines and the general public. Finally, Greyhound

offered, if permitted to acquire the 500,000 shares, to purchase enough additional shares at $25 each to give it 50% of the stock of REA, the offer to remain open for 60 days following Greyhound's acquisition of the 500,000 shares. It expressed willingness, however, to purchase the 500,000 shares and leave "to the future the question of the acquisition of additional shares by Greyhound to give the railroads an opportunity to reconcile their views on this question."

REA countered with an offer to sell the 500,000 shares at $20 per share provided Greyhound would agree to offer within the 60-day period to purchase an additional 1,000,000 shares of the outstanding stock at the same price. The agreement was consummated on this basis subject to ICC approval.

REA's application to the ICC sought approval only of the issuance to Greyhound of the 500,000 shares. The application was supplemented with detailed data reviewing the negotiations, a statement of REA's financial condition and a statement of the purposes to which the $10,000,000 realized from the sale of the 500,000 shares would be applied. The burden of the protests of numerous intervenors was that the transaction was not in the "public interest" and for a "lawful object," but rather was the first step toward establishing a virtual monopoly of express transportation, and would result in "control" by Greyhound of REA, necessitating a hearing under § 5 of the Act.[2] The Department of Justice also intervened.

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[2] Section 5 (2) (a) (i) of the Act, 49 U. S. C. § 5 (2) (a) (i), authorizes any carrier, with the approval and authorization of the Commission, "to acquire control of another through ownership of its stock or otherwise . . . ." Upon application of a carrier seeking such authority, the Commission "shall afford reasonable opportunity for interested parties to be heard," and if "the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction

It urged the ICC to conduct a hearing to determine whether the transaction would violate § 7 of the Clayton Act,[3] suggesting that, while a § 5 proceeding might be unnecessary, one might be instituted and consolidated with the recommended Clayton Act § 7 proceeding, since the anticompetitive issues involved would be virtually identical.

Division Three of the ICC approved the application without hearing, ruling that investigation into the "control" and "anticompetitive" issues "would not be appropriate at this time . . . ." After the ICC denial of petitions for reconsideration this action to enjoin and set aside the ICC order was filed. The full Commission meanwhile reconsidered and affirmed the action of Division Three but postponed the effective date of the order pending the conclusion of judicial proceedings.

In the District Court the parties adhered basically to the positions maintained before the ICC, except that the Department of Justice abandoned its position urging a hearing on the § 7 question and declined either to support or to oppose the ICC order. In sustaining the order the District Court reasoned that, while the ICC might be required in some circumstances to consider "control" and "anticompetitive" issues before approving a stock issuance under § 20a, the ICC properly exercised discretion

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is within the scope of subdivision (a) . . . and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . ." § 5 (2)(b).

[3] Section 7 of the Clayton Act, 15 U. S. C. § 18, provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

to defer consideration of such questions in this case until after it was determined whether and to what extent Greyhound would succeed in purchasing additional shares from railroad stockholders; only then would the "chain of events started by the stock issuance . . . [be] ascertainable rather than conjectural." 255 F. Supp. 704, 709.

In this Court the Government concedes, and the other appellees assume *arguendo*, that important issues of "control" and "anticompetitive" effects were involved in the application before the ICC. The Government comes full circle, however, from its position before the ICC, arguing here that § 20a was designed to accomplish only the limited objective of protecting stockholders and the public from fiscal manipulation, and that in any event, postponement of consideration of "control" and "anticompetitive" issues was justified in this case because the facts relevant to both issues might be wholly different at the end of the 60-day period, and because no prejudice to any party's interests could result from the delay.

II.

We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation.[4] Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the trans-

[4] Section 20a was originally § 437 (1) of H. R. 10453, 66th Cong., which was almost identical to earlier legislation passed by the House in 1910 and 1914. See 58 Cong. Rec. 8317–8318 (1919). The 1910 version led to a study which condemned as a "public evil" intercorporate holdings of railroad stock. Report of the Railroad Securities Commission, H. R. Doc. No. 256, 62d Cong., 2d Sess., 21 (1911). These findings were part of the background against which Congress eventually passed § 20a, along with the Federal Trade Commission and Clayton Acts.

action may exceed limitations imposed by other relevant laws. Commonsense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anticompetitive effects. Thus the ICC is required to weigh anticompetitive effects in approving applications for merger or control under § 5 of the Act, authorizing the ICC to grant such applications only if "consistent with the public interest." *McLean Trucking Co.* v. *United States*, 321 U. S. 67. And similarly broad responsibilities are encompassed within like broad directives addressed to other agencies. *E. g.*, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224; *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 94; *California* v. *FPC*, 369 U. S. 482, 484–485.

It is true that the requirement that the ICC consider anticompetitive effects is more readily found under § 5, since § 5 (11) enables the ICC to confer immunity from the antitrust laws for transactions approved under § 5 (2).[5] But the foundations of the ICC's obligation under § 5 are largely applicable to § 20a as well. Section 20a, like § 5, must after all be read in the context of overall ICC responsibilities. The responsibility under § 11 of the Clayton Act[6] to enforce that Act's provisions

[5] Section 5 (11), 49 U. S. C. § 5 (11), provides that "any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized . . . shall be and they are relieved from the operation of the antitrust laws . . . ."

[6] Section 11 of the Clayton Act, 15 U. S. C. § 21, provides in pertinent part: "(a) Authority to enforce compliance with . . . [§ 7] by the persons respectively subject thereto is vested in the Interstate

is one of them. The responsibility to advance the National Transportation Policy, read into the "public interest" standard of § 5, is another persistent and overriding duty, equally applicable to § 20a. In sum, as we said in *McLean Trucking, supra*, while transportation "legislation constitutes the immediate frame of reference within which the Commission operates . . . and the policies expressed in it must be the basic determinants of its action . . . , in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter." 321 U. S., at 80.

In proceedings under § 20a (2), the ICC itself has not acted as though it lacks the power or responsibility to weigh anticompetitive consequences. In *Columbia Terminals Co.—Issuance of Notes*, 40 M. C. C. 288, 293, an application to issue notes under § 20a (2) was granted in part only on the condition that the notes be made the subject of competitive bidding. The ICC explicitly rejected the argument that § 10 of the Clayton Act, 15 U. S. C. § 20, requiring competitive bidding in certain situations, was superseded by § 20a. In *Stock of New Jersey, Ind. & Ill. R. Co.*, 94 I. C. C. 727, 729, the Commission said, in considering an application to issue stock: "[I]t can not be said that in the performance of the broad duty imposed upon us by the statute we must confine our investigation and consideration to the effect

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Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended . . . . (b) Whenever the Commission . . . shall have reason to believe that any person is violating . . . [§ 7] it shall issue . . . a complaint . . . containing a notice of hearing . . . . The person so complained of shall have the right . . . to show cause why an order should not be entered by the Commission . . . requiring such person to cease and desist from the violation . . . ."

of proposed issues upon the carrier immediately involved. In any application to us for authority to issue securities we are bound to measure the proposal by the test of public interest in whatever phase that interest may appear to be affected."

This "broad duty" was significantly adhered to in *Chesapeake & O. R. Co. Purchase*, 271 I. C. C. 5. There, the C & O sought modification of an earlier order so as to enable it to acquire and exercise 400,000 shares of New York Central, and two of C & O's directors sought authority under § 20a (12) to hold seats simultaneously on the Central Board. C & O and its directors alleged, in terms strikingly similar to the claims in this case, that Central needed funds and new management, and that the two companies were contemplating plans of mutual advantage and ultimately a merger under § 5 (2). The ICC took a broad view of its power and responsibility. It found, as to the § 20 (12) issue, that an insufficient showing had been made that "neither public nor private interests . . ." would be adversely affected by the proposed interlocking directorate, citing its own cases to the effect that authority would be granted under § 20a (12) only where no lessening of competition or independence occurred, 271 I. C. C., at 18, and pointing out that, even if the Central were strengthened, an interlocking directorate might injure other railroads in which the "public has just as great an interest . . . ," 271 I. C. C., at 40. In treating the request that it approve the stock acquisition, the ICC referred in great detail to the facts that (1) the acquisition, when considered along with long-range plans, would result in C & O control of Central; (2) extensive competition between C & O and Central would be eliminated; and (3) cooperation between C & O and Central would pose a substantial threat to another railroad, 371 I. C. C., at 24–29. It refused to authorize the acquisition, concluding that it was in effect being asked "to sanction

a violation of the provisions of section 5 (4) [requiring carriers to request authority under § 5 (2) before acquiring control of another carrier] and also a violation of section 7 of the Clayton Antitrust Act." 371 I. C. C., at 39, 43. It stated that, if the applicants were so confident that their long-run aims would be in the public interest, they should seek authority for control under § 5 (2). These principles and arguments relied upon by the ICC in rejecting C & O's application are equally applicable here. The economic consequences do not differ because we are concerned here with the issuance of stock rather than an acquisition on the open market.

Appellees argue, with some ambivalence, that it would be anomalous to require the ICC to consider anticompetitive issues under § 20a (2). The ICC is authorized under § 5 to grant antitrust immunity for consolidations. No such power exists under § 20a,[7] and the Government contends therefore that to require consideration of § 7 issues under § 20a would lead to the "anomalous conclusion that a securities issue may have to be disallowed even though it might be the first step in an acquisition of control that the Commission could, on proper findings, authorize under section 5 notwithstanding antitrust considerations." REA advances a variant of this argument pointing out that the Sixty-sixth Congress, which passed both § 5 and § 20a, would not have "adopted the erratic

[7] In *Pan American World Airways* v. *United States*, 371 U. S. 296, we held that Congress had entrusted the narrow questions there presented to the CAB; but the violations alleged were of the Sherman Act, which unlike the Clayton Act, 15 U. S. C. § 21, *supra*, note 6, contains no provision imposing an affirmative duty upon the agency to enforce the Act's provisions. The industry there was one "regulated under a regime designed to change the prior competitive system," *id.*, at 301, and the CAB could have retained power and granted antitrust immunity for the actions involved had they occurred after passage of § 411 of the Civil Aeronautics Act of 1938, *id.*, at 312.

policy of relaxing enforcement of the antitrust laws when competition was eliminated but requiring strict enforcement when lesser competitive harm might occur."

First, it is by no means true that greater competitive harm necessarily results from consolidations than from stock issuances under § 20a. A particular consolidation may be in the public interest because it increases competition in some respects, while a stock issuance, even though not involving control, may have no similar redeeming feature. Second, any anomaly which may be created by the juxtaposition of §§ 5 and 20a stems, not from the fact that no immunity may be granted under § 20a, but from the ICC's special power under § 5. The obligation to enforce the Clayton Act is the rule, and § 5 is the exception. Finally, there are good reasons upon which Congress may have relied in providing that immunity might be conferred under § 5 but not under § 20a. Congress recognized in the Transportation Act of 1940, as it had in the Act of 1920, that railroad consolidations often result in benefits for the national transportation system as well as for the railroads involved. Consequently, it authorized the ICC to approve consolidations and to immunize them from the antitrust laws when they were found to be in the public interest. The special benefits sometimes realized from carrier consolidations are less likely to come about through the mere issuance of stock, unless the issuance results in control or merger; and when control or merger does result, the party acquiring control may invoke the Commission's power under § 5 to immunize the consolidation from the antitrust laws.

Appellees' reliance upon *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 355 U. S. 415, is misplaced. That litigation stands at most for the proposition that the ICC has discretion in some circumstances to consider § 20a issues without coming to grips with the question

whether control of one carrier by another may be unlawful. Alleghany had acquired control of the New York Central without ICC approval. It applied to the ICC rather than to the Securities and Exchange Commission for approval of an issue of preferred stock. The ICC took jurisdiction on the ground that, while Alleghany was an investment company normally under the jurisdiction of the SEC, its control of Central made it a carrier subject to ICC regulation. The District Court set aside the order approving the issuance on the ground that ICC jurisdiction to act under § 20a could not rest upon control it had not approved. This Court reversed, pointing out that it would be contrary to the policy of the statute to oust the ICC of regulatory jurisdiction because a noncarrier had failed to abide by the law. On remand the District Court considered the illegality of Alleghany's control as relevant to the merits of the issuance under § 20a, and we reversed again, stating simply that the only issue left open on remand was whether the stock issue "as approved" was unlawful. 355 U. S. 415, 416. However this litigation may be interpreted, it wholly fails to support the proposition that, because § 20a was designed primarily to protect against fiscal manipulation, the ICC is relieved of the necessity of considering other issues germane to the transaction.

We conclude, therefore, that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances under § 20a (2). This does not mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present. But it does mean that, when the ICC exercises its discretion to approve issuances without first considering important control and competition

issues, the reviewing court must closely scrutinize its action in light of the ICC's statutory obligations to protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral. We turn now to this question, first with respect to the deferral of the control issue, and second with respect to the deferral of the anticompetitive issues.

III.

REA's proposed issuance of a 20% stock interest to Greyhound undoubtedly raised a serious question whether control of its operations might pass to Greyhound. Control under § 5 must be judged realistically, and is a matter of degree. See *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. Even the 20% acquisition standing alone might raise an issue of control necessitating greater consideration than given it by the ICC, but it is clear from REA's own evidence that the purpose of its negotiations with Greyhound was to bring the two companies into a joint alignment. The 20% stock issuance was treated by both as the first step of a more ambitious project, and as evidence of the seriousness of each other's intentions to that end.

What the ICC has done must, however, be placed in perspective. It has not denied that a substantial issue of control is present, and it has not refused to consider the issue. It has held only that consideration should be deferred for the 60-day period during which Greyhound has agreed to extend to REA stockholders an offer to purchase up to 1,000,000 shares. We have stressed the unsatisfactory consequences which often occur when agencies defer action and leave parties uncertain as to their rights and obligations. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510. We might also

observe that the ICC apparently could have avoided the deferral by requiring REA and Greyhound to reform their contract so that all the facts relevant to the control issue could be ascertained before approval was given under § 20a (2).[8] Nevertheless, we cannot say that the ICC exceeded its discretion when it deferred consideration of the control issue; radical changes in the relevant facts may take place during the 60-day period, and it is highly unlikely that any harm can flow to appellants or to the public interest from a deferral limited to that issue.

Resolution of the "public interest" issue under § 5, requiring consideration of anticompetitive and other consequences, is required when the threshold fact of control or merger is established. But in this case, even assuming that the 20% purchase may amount to "control" under the existing stock distribution, events may occur during the 60-day period which might negate this possibility. Some railroads have indicated their intention to sell their REA holdings, but whether Greyhound or the dissident railroads wind up in a controlling position may depend on the extent to which the latter exercise their right of first refusal. The dissident railroads have made clear their intention to prevent Greyhound from acquiring any additional shares, but even if they obtain one-third of REA's stock they will be able to determine the composition of REA's Board of Directors. In either case, the added power in the hands of the dissident roads may, depending on the circumstances, lead the ICC to find that Greyhound had not

[8] A change in the agreement providing that Greyhound should offer to purchase the stock held by the railroads before the issuance of the 500,000 shares would have developed the relevant facts, and made unnecessary postponement of the determination of either the control or competition issues.

acquired control.[9] Thus the control question can more realistically be resolved with finality after the 60-day period.

Moreover, the ICC reasonably concluded that allowing Greyhound tentatively to acquire the 20% stock interest would not prejudice appellants as to the control issue in light of the dissident railroads' position that Greyhound would not acquire "one additional share under the offer to purchase up to one million shares . . . ," and because Greyhound would be unable under REA's bylaws to control the board, since its five directors would be faced by 18 railroad directors, any 13 of whom would have the power to prevent any action proposed by Greyhound.

IV.

The action of the Commission in deferring consideration of the anticompetitive issues stands on a different footing. The Commission's responsibility under § 5 and under the Clayton Act differs markedly, and the reasons which support an exercise of discretion as to the control issue are wholly inapplicable to the anticompetitive questions. There is, in short, no reasonable justification for deferring the Clayton Act questions.

The Commission is, of course, required to consider anticompetitive issues under the public interest standard of § 5, just as it must under the public interest standard of § 20a. But the duty under § 5, as we point out above, arises only after the threshold fact of control is established. No such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. A company need not acquire control of another company in

[9] If the dissident REA railroad stockholders exercised their right of first refusal to buy the 1,000,000 shares the other railroad stockholders might sell, their combined stockholdings would be increased to over 50% of the REA shares. See Brief for the United States and ICC, p. 18, n. 9.

order to violate the Clayton Act. See, *e. g.*, *United States* v. *du Pont & Co.*, 353 U. S. 586; *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (D. C. S. D. N. Y. 1957), aff'd, 259 F. 2d 524 (C. A. 2d Cir. 1958). Section 7 proscribes acquisition of "any part" of a company's stock where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Moreover, the purpose of § 5 is significantly different from that of the Clayton Act. Section 5 is designed to enable carriers to seek and obtain approval of consolidations with other carriers, with immunity from the antitrust laws. When a carrier effects a consolidation without ICC authority, the Commission can of course act under § 5 (4). But, as the Commission has often held, the carrier must initiate consolidations under § 5, and it is reasonable to expect that carriers will seek the benefits of that provision. In contrast, the Clayton Act is prohibitive, and imposes a positive obligation upon the ICC to act. The Commission is directed, whenever it has reason to believe any carrier within its jurisdiction is violating § 7, to "issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing . . . ." 15 U. S. C. § 21 (b). Section 16, 15 U. S. C. § 26, excepts from the power of private persons to bring § 7 suits for injunctive relief all cases involving matters subject to ICC jurisdiction. By thus limiting the authority of private persons to institute court proceedings to enjoin § 7 violations, this provision underscores the ICC's responsibility to act when such violations are brought to its attention.

One of the principal justifications advanced for the ICC's deferral of the control issue is that the facts relevant to that issue may change so significantly during the 60-day period that the control question could be settled either way. No such possibility exists with respect to at least some of the anticompetitive issues presented by

REA's application. We need not accept the argument of appellants, based upon the distinction between "express" and other forms of transport, see, *e. g., Railway Express Agency, Inc., Extension—Nashua, N. H.*, 91 M. C. C. 311, 322, sustained *sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass.), aff'd, 376 U. S. 514, that the 20% stock acquisition would itself violate § 7 because REA controls 88% and Greyhound 7% of the "express" market. For if appellees REA and Greyhound are correct that, because of the increasing cross-competition among groups carrying transport, it is impossible to categorize REA as a carrier of "express," then the claims of appellant truck lines, freight forwarders and trucking associations take on added significance. It is is precisely the increasing diversification of REA's transport activity, together with Greyhound's considerable capacity and the economies and efficiencies the two companies intend to effectuate jointly, that concerns these appellants.

It is clear that REA and Greyhound contemplate major changes in their operation which could have a significant impact upon competition for express and other types of transport which they seek to carry. The "Memorandum of Understanding" into which the companies entered about three weeks before REA agreed to Greyhound's 20% stock acquisition contemplates efficiencies and savings through consolidation of facilities for terminal service, of garages, and of communications, advertising and sales forces. These changes might therefore realize large savings for both REA and Greyhound, and in this way and other ways significantly strengthen their competitive position. And the Memorandum expresses a determination to engage in aggressive action to capture larger shares of express and transport business, especially by utilizing Greyhound's bus operations as a complement to REA air and rail service. "The consoli-

dation of effort by the two companies," the Memorandum states, "would create a new market with revenue opportunity arising from a complete package express service to the public." The "new ability" of the air express service to reach off-airline points would add significantly to REA and Greyhound revenues, and the new market would have an estimated growth potential of 10% per year. Similarly, rail-bus service was expected to generate millions in "new business," and to "create a new capability for the two carriers to compete in the ltl [less-than-load] market. The only foreseeable limitation to the growth of this service would be the physical space limitations of Greyhound's fleet."

There is nothing in the record to rebut the allegations of many of the appellants that cooperation between Greyhound and REA of the sort contemplated by the Memorandum aided by the 20% stock acquisition will result in serious harm to appellants individually and to the public interest which they serve. The freight forwarders fear a great reduction in their business, as do the bus companies. Some of the bus companies, which engage in commuter transport, claim that Greyhound-REA cooperation would deprive them of their express business, and that, since that business makes economically feasible their commuter operations, would compel the termination of services essential to the public interest.

It cannot be said with assurance that deferral of consideration of the anticompetitive issues will in no way prejudice appellants or the public interest. The fact that the railroads presently control the REA Board of Directors is hardly relevant to that question. It is not the possibility of control that may prejudice appellants and the public interest, but simply the fact that with Greyhound holding 20% of REA's stock there is likely to be immediate and continuing cooperation between the companies, cooperation which appellants claim will

be to their detriment and which the Government concedes may be against the public interest. If appellants are correct, and if such an alliance would in fact be against the public interest, then § 7 of the Clayton Act requires that it be stopped in its incipiency. Cf. *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 606, n. 5.

We are told that REA is in need of funds, and that ICC approval of the 20% stock acquisition assures that REA will obtain capital and gain a measure of independence from the railroads. There is certainly support for the position that REA needs to free "itself from the control and domination previously exercised by its railroad shareholders over its operations." 80 Ann. Rep. ICC, p. 22 (1967). The strong ties between REA and the railroads led to the operation of REA in the railroads' own interests, without regard to their coincidence with REA's best interests or the public interest. Prior to a 1959 agreement, generated in large part by REA losses, see *Express Contract, 1959, supra*, 308 I. C. C., at 546, REA was required to distribute traffic among carriers on the basis of existing traffic patterns, and the consent of rail carriers operating between given points was required before REA could utilize carriers other than railroads between those points. Changes in these limitations have enabled REA to finance some improvements and steadily to increase its corporate surplus. Study of REA Express, Staff Liaison Group V–C, CAB, FMC & ICC 24–26 (1965). But it does not follow that REA will be any better off in the long run, or that the public interest will be advanced, if its ownership shifts in part or entirely to Greyhound.

While the history of REA does not in itself provide a blueprint for its future, it does "afford a basis for considering the lawfulness of REA's status and activities, and the economic desirability of its apparent direction of growth." Study, *op. cit. supra*, at 3. That history indi-

cates that there may be some relationship between REA's depressed state and its close ties with railroads. Before acting on this premise, however, the ICC must at least consider the question whether a given course of action will in fact alleviate the problem. If railroad ownership operated in the past to deprive REA of an opportunity to prosper and serve the public interest, it is not inconceivable that partial ownership by Greyhound will have the same result. Greyhound, presumably, is no less likely to act in its own interest. If the railroads operated REA, as appellees contend, to minimize competition for transport generally between REA and the railroads, and for express between the railroads themselves and between railroads and other modes of transport, how will partial or complete ownership by Greyhound change things? Even if only partial ownership results, may Greyhound and the other railroad owners operate REA so as to minimize competition between REA and themselves for transport generally? What effect, for example, would partial ownership by Greyhound have upon the recent efforts of REA to add to its express operations the hauling of larger and more varied volumes of freight, efforts which bring it into competition with Greyhound and other bus lines as well as with truck lines and freight forwarders? Moreover, what assurance is there that REA will not tend to route shipments via Greyhound in preference to more efficient or economical carriers or modes, just as the railroads bound REA to use their lines as opposed to other modes, absent their approval? We assume that REA needs funds and would be better off more independent from the railroads, but before the ICC can use these reasons to justify a diversification of ownership it must at least consider whether the specific action approved may operate to the detriment of REA or the public interest.

There is, finally, little merit to the Government's argument that deferral of the anticompetitive issues is

strongly supported by consideratons of administrative convenience. The only circumstance in which the anti-competitive issues may be eliminated from the case is if Greyhound, thwarted at the end of the 60 days in its plans to control REA, were to dispose of its 20% interest. But the ICC can hardly justify deferral of consideration of the consequences of a transaction on the possibility that the problems its approval creates may shortly vanish by a reversal of the transaction itself. Of course, if, as appellees claim, it is most likely that Greyhound will acquire no further stock, then consideration of those consequences now would not be wasted effort. And the argument of wasted effort is still less persuasive if appellees are proved wrong and Greyhound does acquire more stock. For the most significant question which the ICC must face is whether it is in the public interest that REA continue to be owned by other transport companies, and specifically by Greyhound. Once this question is resolved as to the 20% stock acquisition, and the consequences of that acquisition fully weighed, the ICC's task in any subsequent proceeding if Greyhound enlarges its stock interest will be far more manageable.

We therefore conclude that, although the possibility that Greyhound may not increase its holdings within the 60-day period may justify deferral of resolution of the control issue, it does not justify delay in consideration of the anticompetitive effects of the 20% transaction. The Government was correct in its position before the ICC that this record placed "before the Commission serious questions under section 7 of the Clayton Act," requiring a hearing.

The judgment of the District Court is reversed with direction to enter a new judgment remanding the case to the Interstate Commerce Commission for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 305.—October Term, 1966.

The Denver and Rio Grande Western Railroad Co. et al., Petitioners, *v.* United States et al.	On Appeal From the United States District Court for the District of Colorado.

[June 5, 1967.]

Mr. Justice White, concurring in part and dissenting in part.

I agree with most of the Court's opinion, with its holding that competitive factors must be considered in a § 20a proceeding and with its ruling that a hearing should have been held by the Commission in this case before approving the issuance of the securities by Railway Express Agency, Inc., to Greyhound Corporation. But I am doubtful about those parts of the Court's opinion which indicate that although the public interest requires the consideration of competitive factors in connection with the issuance of stock under § 20a, the public interest also demands that if a lessening of competition is found or threatened within the meaning of § 7 of the Clayton Act, the issuance must be disapproved. Under § 5, competitive factors must also be considered in determining the public interest, but there a balanced view of the public interest permits the approval of a merger or consolidation despite any actual or probable competitive impact. Mergers which would violate § 7 are thus permissible under § 5 if found in the public interest but only those acquisitions of stock which are not suspect under § 7 of the Clayton Act are permissible under § 20a.

In the last analysis the Court rests this rather odd distinction on the act itself—that is, Congress is said to have intended this very result because it provided in § 5 (11) that the approval of a transaction under § 5

relieves the parties from antitrust liability and did not so provide in connection with § 20a transactions. I do not think, however, that this ends the matter, and I find unconvincing the speculative reasons the Court gives for suggesting that Congress intended any such result.

Much more persuasive to me is the approach of *Pan American World Airways* v. *United States*, 371 U. S. 296. That case involved the Civil Aeronautics Act of 1938, re-enacted as the Federal Aviation Act of 1958, which provided antitrust immunity for transactions approved by the Commission under §§ 408, 409, and 412. The course of conduct attacked by the United States under § 1 of the Sherman Act in *Pan American* was not, however, within any of these sections. The Court, nevertheless, held that the conduct was clearly of the kind specifically committed to regulation by the Commission under other sections of the Act and was unassailable in an independent civil action brought by the United States under § 1 of the Sherman Act.

In the case before us, § 20a provides that it shall be unlawful for any carrier to issue securities unless approved by the Commission after finding that the issuance:

> "(a) is for some lawful object within its corporate purposes, and compatible with public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." § 20a (2).

The Commission may grant an application under § 20a in whole or in part with such modifications and on such terms and conditions as the Commission may deem appropriate, and it may from time to time make such supplemental orders with respect to the transaction as it may deem necessary. § 20a (3). Moreover, it is

expressly provided that "[t]he jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein." § 20a (7).

Having these powers conferred upon it in the name of public interest, the Commission may, in my view, approve the issuance of stock by a carrier if it deems the public interest requires it even though there may be a probable lessening of competition which otherwise would violate § 7 of the Clayton Act. This seems to be precisely what Congress intended by expressly providing in § 7 of the Clayton Act itself that "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . under any statutory provision vesting such power in such Commission. . . ." 15 U. S. C. § 18.

It makes very little sense to me to hold that a stock acquisition involving control may be approved if the public interest requires it, despite any actual anti-competitive impact, and yet to forbid the approval of an acquisition which falls short of control but which "may" injure competition within the meaning of the Clayton Act.

Thus while I agree that a hearing should be required before the Commission approves the issuance of the securities in this case, I would make it clear that competitive considerations are only some of the factors to be weighed in reaching a decision concerning the public interest, much as the Court has viewed the proceedings under § 5. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. At the very least I would not now decide that the Commission is powerless to approve the issuance of securities under § 20a if it determines that the impact on competition would otherwise be barred by the Clayton Act.

SUPREME COURT OF THE UNITED STATES

No. 305.—October Term, 1966.

The Denver and Rio Grande Western Railroad Co. et al., Petitioners, *v.* United States et al. | On Appeal From the United States District Court for the District of Colorado.

[June 5, 1967.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

This case involves a proposed stock issue by appellee Railway Express Agency, Inc. (REA), of 500,000 shares of previously authorized but unissued shares of its common stock. Under § 20a (2) of the Interstate Commerce Act, 49 U. S. C. § 20a (2), this type of stock transaction must be authorized by the Interstate Commerce Commission, which must determine whether the issue is "for some lawful object within . . . [the applicant's] corporate purposes, and compatible with the public interest . . . ."

Under the proposed transactions REA contracted to sell this block of shares for $10,000,000 to the Greyhound Corporation, which would then offer to purchase within a 60-day period an additional 1,000,000 shares from existing stockholders, all of whom are railroads and all of whom hold rights of first refusal as to the sale of existing REA shares. Some of these railroad-stockholders have been opposed to Greyhound's entry into REA and have expressed their intention to exercise their pre-emptive rights. It is undisputed that if Greyhound nevertheless succeeds in purchasing these additional shares it would be in a position to exercise a substantial degree of control over REA, cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145, and that such control would require the approval of the ICC under § 5 (2) of the Interstate Commerce Act, 49 U. S. C. § 5 (2). It was also alleged by the

United States as an intervenor before the ICC that the possible exercise of control by Greyhound over REA and an anticipated co-ordination of certain services by the two carriers [1] raised serious antitrust questions under § 7 of the Clayton Act, 15 U. S. C. § 18, which the ICC is bound to enforce as to regulated carriers, Clayton Act § 11, 15 U. S. C. § 21.

The Interstate Commerce Commission did not deal with the substance of these "control" and "antitrust" issues. It found that REA "urgently needs the proceeds of the $10,000,000 . . . ," [2] and that it was not necessary, given the uncertainty as to the future relationship of Greyhound and REA, to deal with the control issue at that time. The Commission noted specifically that "if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition . . . ."

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[1] The Commission found that REA had agreed "to consider seriously and work toward a long-term agreement between applicant [REA] and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage . . . ." A "Memorandum of Understanding" between an official of each of the two companies contained some suggested methods for achieving these goals.

[2] The ICC's order dealing with the legitimacy of this transaction said: ". . . applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000 . . . ."

On review, a three-judge District Court for the District of Colorado sustained the Commission's order, 255 F. Supp. 704. It read the ICC's decision, as does this Court, as saying only "that in the circumstances presented the public interest requires the issuance of the stock and that determination of the competitive effects will be appropriate for consideration after the chain of events started by the stock issuance is ascertainable rather than conjectural." *Id.*, at 709. The District Court then held that "in the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its discretionary powers." *Id.*, at 710.

I would affirm this judgment of the District Court, and therefore must dissent from today's decision. The Court holds that "the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the 'public interest' and for a 'lawful object,' to consider the control and anticompetitive consequences before approving stock issuances under § 20a (2)." *Ante*, p. 12. The Court notes, however, that "this does not mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present," *ibid.*, but concludes that while it was not an abuse of discretion to defer consideration of the "control" question raised by the intervenors, it was improper to refuse to deal with the "anticompetitive" issues at this stage. I believe that this decision misapplies the relevant statutes and seriously impedes sound administrative practice.

I.

Section 20a (2) of the Interstate Commerce Act is concerned with new stock issues. The dominant concern of Congress was with "faulty and dishonest financing,"

1 Sharfman, The Interstate Commerce Act 190 (1931),[3] and nothing in the legislative background of the section indicates that the words "for some lawful object within its corporate purposes, and compatible with the public interest" were intended to encompass issues of antitrust law. Of course the phrase "the public interest" is broad, and in the context of other legislation comparable terms have been held to embrace antitrust matters. *E. g.*, Federal Communications Act, § 307, 47 U. S. C. § 307, as construed in *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86. But the mere inclusion of such language in this instance is not the end of our inquiry, for § 20a must be read in its entirety and interpreted in conjunction with other sections of the Act.

In contrast to § 20a, which by its detailed and explicit terms deals only with the problem of fiscal responsibility,[4]

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[3] The "public interest" of concern to Congress was the problem of watered stock. See, *e. g.*, statement of Congressman Rayburn: ". . . if we write into the law of the land a statute to the effect that before a railroad can issue new securities, before it can put them on the market, it must come before the properly constituted governmental agency, lay the full facts of its financial situation before that body, tell that body what it intends to do with the money derived from the sale of the issue of securities, and after it has received the approval of that regulating body and it goes out and puts those securities on the market, then the Interstate Commerce Commission by this law is empowered at any time to call it to account and have it tell to that regulating body that it expended the money, the proceeds of the sale of securities, for the purposes for which it had made the application." 58 Cong. Rec. 8376 (1919). See also statement of Congressman Esch, *id.*, at 8317–8318. See generally MacVeagh, The Transportation Act of 1920, at 486–492 (1923).

[4] Section 20a (2) reads in its entirety: "It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier

§ 5 of the Act, enacted at the same time,[5] deals specifically with problems of "control." Indeed, the standards laid out in § 5 are directly relevant to the various factual issues hypothesized by the Court in Part IV of its opinion. Section 5 does not deal solely with transfers of shares, but with any lease or contract between two carriers for the operation of their properties, §§ 5 (2)(a)(i), 5 (4); see *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115, 125. It would thus appear that any type of agreement between Greyhound and REA for the integration of their operations would—with or without the sale of shares—fall within the purview of § 5.

Section 5 not only deals explicitly with problems of control, but it establishes the public interest criteria which the ICC is bound to use in making that type of inquiry. For example, the Commission must consider "(1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." § 5 (2) (c). This Court has recognized that standards of market control in the transportation industry are different from those governing other business

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corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes."

[5] Both sections were parts of the Transportation Act of 1920, 41 Stat. 456, 481, 494.

transactions: the ICC must take account of antitrust policy in judging the control questions under § 5, *McLean Trucking Co.* v. *United States*, 321 U. S. 67, but this interest is simply one of the relevant criteria, and if on balance the Commission finds a proposed undertaking to be in the public interest the statute authorizes a grant of antitrust immunity to the transaction. § 5 (11); *Seaboard Air Line R. R.* v. *United States*, 382 U. S. 154; *Minneapolis & St. L. Ry.* v. *United States*, 361 U. S. 173; *McLean Trucking Co.* v. *United States*, *supra*. Section 5 thus covers fully the problems of control; likewise, the antitrust issues are dealt with specifically in § 11 of the Clayton Act, which authorizes the ICC to enforce § 7 of that Act, forbidding the acquisition of stock the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Hence these sections, and not § 20a, are the substantive provisions governing the Commission's jurisdiction in respect to the anticompetitive aspects of this case.

For procedural reasons, too, § 20a seems inappropriate as a vehicle to replace or augment § 5 of the Interstate Commerce Act and §§ 7 and 11 of the Clayton Act. When a carrier applies for authorization to issue stock, the Commission must give notice to the various States in which the carrier operates so that relevant state regulatory agencies, which also supervise the finances and corporate structure of these companies, may raise objections to the proposed transaction. The Commission need not, however, hold a hearing before approving the transaction. § 20a (6). In contrast, when the ICC deals with problems of control under § 5, it is bound not only to notify the various state authorities but also to "afford reasonable opportunity for interested parties to be heard." § 5 (2)(b). And § 11 of the Clayton Act requires the Commission to notify the Attorney General if it believes that any carrier is violating § 7, and the Attorney

General has the statutory right to intervene in the mandatory hearing on the question.

Given the complexities of control and antitrust problems in the transportation field, and given the specific and detailed provisions of the statute in § 5, and in § 11 of the Clayton Act, devoted particularly to them, it seems to me quite evident that the sounder view of the statutory scheme is to regard § 20a as being limited to matters of corporate financing and § 5 and § 7 as being the source of the Commission's authority and duty to deal with these other matters.

None of the Commission cases cited by the Court in support of its position that § 20a was envisioned as also encompassing control and antitrust considerations is apposite. *Columbia Terminals Co.*, 40 M. C. C. 288, dealt, as the Court notes, with § 10 of the Clayton Act, 15 U. S. C. § 20, which specifically requires common carriers in certain situations to sell securities "by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission." The ICC merely held that this statute had not been repealed by § 20a. The general language cited by the Court from *Stock of N. J., Ind. & Ill. R. R.*, 94 I. C. C. 727, was written in a case in which the issue was whether the applicant railroad could pay an indebtedness to its sole stockholder, another railroad, through a distribution of stock as a dividend. The ICC held this method of financing acceptable; antitrust considerations were in no way involved.

The third ICC decision cited by the Court, *Chesapeake & O. Ry. Co. Purchase*, 271 I. C. C. 5, would seem, if anything, inconsistent with its view of § 20a. There the Commission was requested to approve an interlocking directorate, which is forbidden unless authorized by the Commission pursuant to § 20a (12) of the Interstate Commerce Act, 49 U. S. C. § 20a (12). In making its

decision the Commission did not incorporate § 5 control standards into § 12a (12). Quite the contrary, it noted that "the policy of the Congress as to consolidations, mergers, and other forms of corporate unification and association is now to be found in the provisions of section 5," *id.*, at 12, that no application under § 5 (2) had been filed, and that "it follows that the evidence pertaining to control of the New York Central or ultimate unification of the two carriers is irrelevant to the principal issues before us, and may not be considered in disposing of those issues." *Ibid.* The Commission then determined, under its established standards for judging the acceptability of an interlocking directorate, *id.*, at 18, that such an authorization would be improper, but observed that "if the applicants are firmly of the opinion that the proposed association will result in the benefits to the carriers and to the public which they contend we should find on the showing that they have made in this proceeding, there is no reason why they should not file an application for some form of association under section 5 (2) of the act." *Id.*, at 41–42.

The lack of authority for the Court's view of § 20a is not limited to administrative decisions. In the complex *Alleghany Corp.* litigation, summarized by the Court, *ante*, pp. 11–12, this Court sustained the ICC's determination that it could act upon a § 20a application without involving itself in difficult issues of intercorporate control as the District Court had ordered. The protracted and tangled character of that litigation, until resolved in the interests of simplicity by this Court's affirmance of the ICC's approach, should be a warning of the unfortunate consequences that may follow judicial requirements complicating and proliferating administrative hearings in unfamiliar fields; this is especially so where there are, as here, numerous parties some of whom have a strong interest in achieving delay.

II.

Although not accepting the reading of the Act which I have urged, the Court nonetheless appears to recognize that the issue of "control" *is* a separate one from that of financial regularity, and one that can appropriately be dealt with in a separate and subsequent proceeding. Since the Court also acknowledges, as it must, that at this later hearing REA and Greyhound may request a § 5 (11) exemption, and thus bring into play all the standards of § 5, I find the Court's insistence that this issue falls within the purview of § 20a rather than § 5 essentially an academic one. The ICC will still be able to conduct its hearings just as it wished to do here, except that its subsequent "§ 5 proceeding" will henceforth be labeled a "§ 20a and § 5 proceeding."

Given the Court's recognition that the ICC has discretion to postpone the "control" determination, I find it difficult to accept its argument that "antitrust" factors may not similarly be postponed.

It should be recalled that the only matter raised in this application is REA's desire to issue 500,000 shares of its stock to "a non-railroad purchaser," which concededly would bring to the issuer capital funds required for investment purposes. Under the proposed transaction, after Greyhound purchases these shares it will extend an offer to purchase within 60 days an additional 1,000,000 shares, as to which other shareholders hold rights of first refusal. All parties are in agreement that control and antitrust problems will be raised if Greyhound is ultimately successful in effecting these additional purchases. The only question is whether the Commission can leave these questions for a later determination. Because of the uncertainty as to the outcome of the further stock purchase offer, the Court agrees that postponement of the control issue was proper. But this uncertainty is equally crucial to the Clayton Act issues.

The likelihood of a Clayton Act violation will of course be increased if Greyhound obtains these additional shares and is in a position to control, and to consolidate operations with, REA. On the other hand, if the shares are bought by some of the appellants whose interests appear to be adverse to Greyhound, the possibility of substantial harm to competition will be minimal. The core of the Clayton Act question, then, is inexorably tied to the control question, and the Court does not deny that these problems overlap. In these circumstances I find it impossible to follow the Court in holding, on the one hand, that the control hearing was permissibly postponed, but, on the other, that the ICC abused its discretion in similarly deferring any Clayton Act hearing.

To require such a proliferation of hearings as to a single transaction—one involving a straightforward business transaction negotiated in terms of existing market conditions and the existing needs of the parties—is bound to obstruct the smooth workings of the administrative process. The penetrating observations of Professor Jaffe seem to me especially pertinent in this situation:

> "I gather the impression that some judges who quite insistently display a 'correct' attitude of deference on substantive issues apply a different standard to procedural decisions: they do not hesitate to protract and to complicate the administrative process. Their premise may be that the considerations that dictate deference to substantive decisions are inapplicable to procedural ones. This is only partly true . . . . Since procedural decisions should be made to serve the substantive task, it follows that expertness in matters of substance are relevant to the exercise of procedural discretion.
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> "[An agency] must ration its limited resources of time, energy and money. It must devote them to those exigent and soluble problems which are most

> nearly related to its core responsibility. What problems *are* most exigent, how they can best be solved . . . are questions the solution to which peculiarly demands a feeling for the whole situation . . . . If a court is not as well fitted to solve substantive problems as the agency, if on this level intermittent, disjected criticism disperses accountability, how much more is this true where the deployment of forces is involved." Jaffe, Judicial Control of Administrative Action 566–567 (1965).

The courts have traditionally permitted busy agencies substantial flexibility in formulating their internal procedures, and encouraged their efforts to eliminate duplicative action and repetitive hearings. See, *e. g., Chicago & N. W. R. Co.* v. *A. T. & S. F. R. Co., ante,* pp. 12–14; *Federal Power Comm'n* v. *Tennessee Gas Co.,* 371 U. S. 145, 153–155, where the Court approved a "two-step procedure" as "not only entirely appropriate but in the best tradition of effective administrative practice"; *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 534–536; *Baltimore & O. R. R.* v. *United States,* — U. S. —, — (dissenting opinion); cf. *Fahey* v. *Mallonee,* 332 U. S. 245; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152–154; *United States* v. *Illinois Cen. R. R.,* 291 U. S. 457.

The allowance of such flexibility, and the exercise of prudence by the courts, is especially appropriate where, as here, the issue is not *whether* to hold a hearing but *when* to do so, and where there has been no showing that harm would come from deferring consideration of the antitrust issues. This is not a case in which a merger is about to be consummated, and in which it might be feared that the integration of two businesses will be impossible to "unscramble" at some future time. Compare *Federal Trade Comm'n* v. *Dean Foods Co.,* 384 U. S. 597. These issues concern, as the Court's parade of speculative

examples indicates, *ante,* p. 20, the implications of a possible future coordination of some carrier services between REA and Greyhound. But these matters will only crystallize for purposes of legal analysis when it is ascertained (1) what type of control, if any, Greyhound will have over REA; and (2) what type of coordinated activities are planned. None of these issues have been prejudged, and provisional relief can be granted by the Commission, if necessary, §§ 5 (2), (7), (9); cf. *Gilbertville Trucking Co.* v. *United States,* 371 U. S. 115, 129–131. The district courts likewise have authority to grant injunctive relief on application of the Commission. § 5 (8).

In these circumstances I do not believe it was an abuse of discretion for the ICC to authorize the issuance of stock, postponing consideration of the control and antitrust issues until the transaction was completed some 60 days later. It is regrettable that the Court's preoccupation with the future antitrust possibilities of this situation, fully acknowledged by all but still entirely speculative, should have led it to interfere, so unnecessarily, with the obviously sensible course of procedure adopted by the Commission.

I would affirm the judgment of the District Court.